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IN THE

Supreme Court of the United States

October Term, 1965

No. 1265

JAMES McGUIRE, as President and JOSEPH DIOVISALVO, as Secretary-Treasurer of COAL, GASOLINE, FUEL OIL TEAMSTERS, CHAUFFEURS, OIL BURNER INSTALLATION MAINTENANCE, SERVICEMEN AND HELPERS OF NEW YORK CITY AND VICINITY, NASSAU AND SUFFOLK COUNTIES, NEW YORK, N. Y., LOCAL UNION NO. 553, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

against

HUMBLE OIL & REFINING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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HUMBLE OIL & REFINING COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

James McGuire, as President, and Joseph Diovisalvo as Secretary-Treasurer of Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil Burner Installation Maintenance, Servicemen and Helpers of New York City and Vicinity, Nassau and Suffolk Counties, New York, N. Y., Local Union No. 553, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, respectively pray that a writ of certiorari issue to review the judgment of the United States Court

of Appeals for the Second Circuit, entered in the above entitled case on January 31, 1966.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated January 31, 1966, is reported at 355 F. 2d 352, and also at 61 LRRM 2410 and 53 CCH LC ¶11,026. It is set forth in full at Appendix A, 1a to 13a. The opinion of the United States District Court for the Southern District of New York, dated September 30, 1965, is reported at 247 F. Supp. 113, and also at 60 LRRM 2529 and 52 CCH LC ¶16,670 and is set forth at 281-317 of the Record in the Court of Appeals. It is set forth in full at Appendix B, 14a to 39a. The opinion of the United States District Court for the Southern District of New York, dated February 17, 1965, is reported at 58 LRRM 2727 and 51 CCH LC ¶19,512 and is set forth at 123-140 of the Record in the Court of Appeals. It is set forth in full at Appendix C, 40a to 51a. The decision and order of the National Labor Relations Board in *Humble Oil & Refining Company*, dated July 8, 1965, is reported at 153 NLRB No. 111, and also at 59 LRRM 1632 and 1965 CCH NLRB ¶9555. It is set forth in full at Appendix D, 52a to 55a.

Jurisdiction

The judgment sought to be reviewed herein was dated and entered in the United States Court of Appeals for the Second Circuit on January 31, 1966, upon the appeal of Humble Oil & Refining Company from a portion of the judgment of the United States District Court for the Southern District of New York dated and entered on October 20, 1965. The judgment of the Court of Appeals is set forth at Appendix E, 56a to 57a. The jurisdiction of this Court to review that judgment by writ of certiorari is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. May an employer which succeeds to another employer's business avoid its duty to arbitrate as set forth in *John Wiley & Sons* v. *Livingston* by recognizing as bargaining agent for transferred employees an uncertified company union which was not selected by the transferred employees?

2. Should a unit clarification decision by the National Labor Relations Board that transferred employees be deemed an accretion to an existing uncertified bargaining unit preclude arbitration of grievances which arose under the union contract with the predecessor employer?

Statutes Involved

The statutes involved are the Labor-Management Relations Act of 1947, as amended, Section 301(a), 29 U. S. C. § 185(a), and the National Labor Relations Act, as amended, Section 9, 29 U. S. C. § 159.

Section 301(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 9, in pertinent part, provides:

> "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of

collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * *

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *.

"(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employer or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof * * *."

Statement of the Case *

Petitioners are officers of a labor union (Local 553) which prior to August 7, 1964, had been recognized as exclusive collective bargaining representative of employees of Weber & Quinn, a partnership, and of Burdi Fuel Co., Inc. Both employers operated retail fuel oil businesses in Brooklyn, New York, and had entered into collective bargaining agreements with Local 553 effective at all relevant times and to December 15, 1965. Separate agreements were maintained for fuel oil truck drivers and for servicemen.

Prior to August 7, 1964, Weber & Quinn obtained control of Burdi and dissolved the corporation, but continued to use Burdi's name, to employ Burdi's employees represented by Local 553, and to observe Local 553's agreements. At the time of the sale hereinafter mentioned, Weber & Quinn employed 24 persons covered by the agreements. Each agreement contained the following arbitration provision:

> "Arbitration—Section 15: Should any difference or dispute arise during the life of this agreement regarding the meaning, interpretation, or application of any of the provisions of this agreement, or regarding any grievance which may arise between the parties, which cannot be adjusted by the representatives of Local 553, I.B. of T., and the concerned Employer and/or the concerned Employer association, the same is to be submitted to arbitration. Either party to the dispute may place the disputed issue in arbitration by request for arbitration in writing served upon the other party and upon the New York State Mediation Board within ten (10) days from the last date of attempted negotiated settlement between the parties. The New York State

* The facts are set forth in the District Court opinions dated February 17 and September 30, 1965, and in the Court of Appeals opinion dated January 31, 1966, which may be found in Appendices C, B and A respectively.

Mediation Board shall appoint one of its staff mediators as the Arbitrator and shall arrange for arbitration of the matter in dispute."

On August 7, 1964, Weber & Quinn effected the transfer of its fuel oil business by selling to Humble Oil & Refining Company its trucks, equipment and fuel oil accounts. Thirteen employees covered by the Local 553 agreements were placed in the Humble organization. Of the others, some were refused employment by Humble and some rejected offers of transfer.

Both before and after the transfer Local 553 requested Humble to acknowledge obligations under the Weber & Quinn agreements. These requests were denied, and Local 553, on September 10, 1964, asked arbitration, pursuant to the above-quoted arbitration provisions, of numerous disputes occasioned by Humble's denial of its requests. These included refusal to acknowledge seniority accrued with Weber & Quinn when allocating work assignments, refusal to pay wages at the contract rate, refusal to make payments for medical and pension benefits, and refusal to provide the holidays and vacations guaranteed in the contracts. Humble refused to proceed to arbitration. On December 23, 1964, Local 553 commenced this Section 301 action to compel arbitration.

On January 20, 1965, after commencement of this action, Humble filed a petition with the National Labor Relations Board requesting a determination that another labor union represented the employees transferred from Weber & Quinn for purposes of collective bargaining. Humble's theory was based on the fact that it had formerly recognized its company union, Industrial Employees Association, Inc. (the Association), as the representative of other employees who performed duties similar to those of the former Weber & Quinn employees. From this it reasoned that it could recognize the Association as representative of the former Weber & Quinn employees. The

Board was asked to approve this arrangement by "clarifying" the Association's unit to include the former Weber & Quinn employees.

At the time the unit clarification petition was filed Local 553's motion for a preliminary injunction was pending in the District Court. That motion was denied (40a to 51a)*, and a motion for summary judgment in favor of Local 553 was thereafter noticed and argued.

On July 8, 1965, the Board issued its decision "clarifying" the Association's bargaining unit to include the former Weber & Quinn employees transferred to Humble. The Board's decision made no reference to the former Weber & Quinn employees rejected by Humble but whose grievances were being pressed in the arbitration proceedings. With respect to the pending Section 301 action, the Board stated that the question of contractual obligations was independent of the issues in the unit clarification proceeding (54a) and did not pass upon it.

The District Court viewed the Board's decision as inconclusive with respect to the question of arbitrability and granted summary judgment for Local 553 insofar as it sought arbitration of the disputes noticed for arbitration. The Court of Appeals reversed and dismissed the complaint.

Reasons for Granting the Writ

Question 1:

The first issue presented by this case involves important questions of federal law and national labor policy regarding arbitration of employees' grievances which have not been, but should be, decided by this Court.

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* Parenthetic references are to pages of the annexed Appendices.

John Wiley & Sons, Inc. v. *Livingston*, 376 U. S. 543, established the right of employees to have their designated representative carry their grievances to arbitration against their employer's successor, thus assuring

> ". . . that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." 376 U. S. at 549.

This protection was provided in *Wiley* by permitting the union which had represented employees of Interscience, the predecessor company, to represent them after its merger into Wiley for the limited short-term purpose of prosecuting grievances resulting from Wiley's denial of rights accrued under the Interscience contract.* This Court explained the limited nature of this continuing representative status as follows:

> "This Union does not assert that it has any bargaining rights independent of the Interscience agreement; it seeks to arbitrate claims based on that agreement, now expired, not to negotiate a new agreement." 376 U. S. at 551.

Local 553 now seeks to arbitrate similar claims on behalf of former Weber & Quinn employees. The rights and benefits guaranteed employees under the Weber & Quinn and Interscience contracts are not distinguishable in terms of inherent permanence or destructibility. Nor is there any reason why their denial by Humble should be considered any less a compensable interference with valuable property rights than was their denial by Wiley.

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* The *Wiley* case has been followed by the Third and Ninth Circuits in requiring the successor company in a sale to arbitrate under the predecessor's union contract. *United Steelworkers of America* v. *Reliance Universal, Inc.*, 335 F. 2d 891 (3d Cir. 1964); *Wackenhut Corporation* v. *United Plant Guard Workers*, 332 F. 2d 954 (9th Cir. 1964).

Adherence to *Wiley* will permit the arbitrator to determine which of these property rights, if any, have been prejudiced by Humble's business transaction with Weber & Quinn and to fix the nature and extent of the compensation which should be given.

Local 553 is the appropriate party to present the grievances in arbitration. They arise from the contracts negotiated by Local 553, and the rights accrued when the employees were employed by Weber & Quinn. At those times Local 553 represented the employees for purposes of collective bargaining and of processing grievances.

The foregoing considerations apply equally in this case and in *Wiley*. The presence of the Association and its recognition by Humble as bargaining agent for the former Weber & Quinn employees does not diminish property rights accrued under the Weber & Quinn agreements nor dilute Local 553's status as the representative to procure compensation for interference with those rights. In both cases demand was made upon the successor company to settle outstanding claims prior to consummation of the business transactions. 376 U. S. at 545; 15a. Any present expense or inconvenience to Humble is a cost of which it was advised before the transaction's completion. Humble's total refusal and Wiley's partial refusal (376 U. S. at 545-546) to accede to initial demands compelled resort to arbitration rather than negotiation as the settlement procedure.

The fact that the Interscience union did not represent an appropriate bargaining unit at Wiley did not prevent it from completing in arbitration the prosecution of the claims initiated prior to the employees' transfer. See footnote 5 to the *Wiley* decision, 376 U. S. at 551. In the present case the Court of Appeals cited footnote 5 to justify its departure from *Wiley* 10a. Presumably, it relied on the second sentence of the first paragraph in the footnote which states:

> "There is no problem of conflict with another union, cf. L. B. Spear & Co., 106 N. L. R. B. 687, since Wiley had no contract with any union covering the unit of employees which received the former Interscience employees."

Since the representative status asserted by Local 553 and the Interscience union called only for their participation in grievance procedures for claims initiated prior to the transfers, the above observation is equally applicable in both cases. The comparison to the *Spear* case remains apt because that case involved a petition for a representation election among employees in a unit created by the merger of two employers. Local 553 has not presented any question of future representation.

The real conflict in this case is not raised by Local 553's status vis-a-vis the Association but by the former Weber & Quinn employees' possession of property rights not held by other Humble employees. Once this fact is understood the identical nature of the problems inherent in *Wiley* and this case become apparent, and the central role of the last paragraph of *Wiley's* footnote 5 to their resolution may be appreciated.

> "Problems might be created by an arbitral award which required Wiley to give special treatment to the former Interscience employees because of rights found to have accrued to them under the Interscience contract. But the mere possibility of such problems cannot cut off the Union's right to press the employees' claims in arbitration. While it would be premature at this stage to speculate on how to avoid such hypothetical problems, we have little doubt that within the flexible procedures of arbitration a solution can be reached which would avoid disturbing labor relations in the Wiley plant."

As a practical matter the conflicts anticipated in the foregoing quotation are less dramatic than a bare reading indicates. In both cases arbitration could not take place until

after expiration of the contracts on which the claims were based.* The likelihood of an arbitration award affecting future conduct at the plant had become minimal. The quotation was perhaps more significant and the possible conflicts were greater in *Wiley* because the Interscience union had

> "... framed its issues to claim rights not only 'now'—after the merger but during the term of the agreement—but also after the agreement expired by its terms." 376 U. S. at 554.

The disputes in *Wiley* specifically raised the question of whether the obligations of the Interscience contract continued "... now and after January 30, 1962". [the contract's termination date]. 376 U. S. at 552. Local 553's claims do not seek to establish relationships continuing beyond the terms of the contracts.**

Most of Local 553's claims involve items which are not generally given application beyond the life of a contract. These include questions of wages (items 2, 8, 17, 20 and 21), of working hours and shift schedules (items 3 and 6), of compensation for use of personal vehicles (item 26), of union membership (item 9) and of union recognition (item 1). Awards on claims of this type can probably be made only as damages based on the arbitrator's assessment of the monetary value of the withheld benefits.

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* The Interscience and Wiley merger took place on October 2, 1961, and the union agreement with Interscience expired on January 31, 1962. 376 U. S. at 544-545. The action to compel arbitration was commenced on January 23, 1962, and the District Court's order denying arbitration was made on March 29, 1962. *Wiley* v. *John Livingston & Sons, Inc.*, 203 F. Supp. 171 (S. D. N. Y. 1962). The Court of Appeals reversed in a decision dated January 11, 1963. 313 F. 2d 52 (2d Cir. 1963). The Local 553 contracts all expired in December, 1965. p. 5, *supra.*

** The claims are set forth in footnote 2 of the Court of Appeals' opinion which is reproduced at 6a-8a.

Claims involving rights which could be found to continue beyond the contracts' terms could also be settled by a monetary award. This would necessarily be true of payments for medical and pension protection (items 22, 23 and 24) whether the award required present payment of a lump sum based on the actuarial value of future payments or required continuing payments. If the arbitrator finds that some benefits have prospective applicability and should be specifically enforced, the possible conflict between benefits of the former Weber & Quinn employees and other Humble employees would be the same as that anticipated in footnote 5 to *Wiley*. Such an award might require that vacations accrued during employment with Weber & Quinn (item 18) be given as vacations rather than compensated by damages (compare grievance (e) in *Wiley*, 376 U. S. at 552) or that seniority accrued with Weber & Quinn requires Humble to offer transferred employees more desirable work assignments (item 5) (compare grievance (a) in *Wiley, ibid.*).

An arbitration award for employees who refused Humble's offers of employment could give monetary damages only. An award for employees rejected by Humble could give damages or an order for Humble to acknowledge their accrued Weber & Quinn seniority and to offer them employment. Thus, as with the transferred employees, a footnote 5 conflict might or might not arise with respect to the rejected employees.

The foregoing discussion has considered the conflicts and problems which might be involved in implementing arbitration awards for the former Weber & Quinn employees and has shown that they are identical with those involved in *Wiley*. The same is true for possible problems during arbitration. Humble's relationship with Local 553 and the arbitration authority designated in its contract will be short-lived and may not permit development of the mutual understanding and sympathy for the parties' view-

points which often characterizes long-term bargaining relationships. The same hurdles existed in *Wiley* and did not bar arbitration.

The Court of Appeals' assumption that additional problems exist in this case is unfounded. It is apparently based on a belief that it would be an "unfair labor practice" for Humble to arbitrate with Local 553 because arbitration ". . . is clearly a part of the collective bargaining process . . . ," the Association is the bargaining agent for Humble's employees, and the National Labor Relations Act ". . . imposes 'the negative duty to treat with no other.' " 12a-13a. This theory is based on a straight-line progression through preselected clichés rather than on the facts. It ignores that Local 553 is not seeking negotiation of a new agreement or arbitration of disputes arising under a new agreement, that Local 553 seeks compensation for past violations of an agreement which has expired, and that many of the grievances are prosecuted on behalf of untransferred Weber & Quinn employees who are not represented by the Association.

In any event, the "bargaining" involved in this case would be identical in nature and in legality to the "bargaining" which resulted from the order to arbitrate in *Wiley*. The rule that an employer may not bargain with one union if another union represents a majority of the employees in an appropriate unit is an aspect of the more inclusive rule that an employer may bargain only with the majority representative of an appropriate unit. Another aspect is that where only one union is involved, it is an unfair labor practice to bargain with that union unless it represents a majority of the employees in an appropriate unit. *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 366 U. S. 731. Since the Interscience union did ". . . not represent a majority of an appropriate bargaining unit in Wiley . . ." (376 U. S. at 551 n. 5), this Court's order to arbitrate, under the Court of

Appeals' reasoning, forced Wiley to commit an unfair labor practice. The fact is that both cases raise a limited and identical "representation" issue which is not encompassed by the unfair labor practice provisions of the National Labor Relations Act. Such limited "representation" did not interfere with Wiley's duty not to bargain with any union; it will not interfere with Humble's duty to bargain only with the Association. It is simply the means of fulfillment of Local 553's function to enforce the pre-existing contract rights of the employees whose employment was disrupted by Humble's purchase.

Question 2:

The second issue presented by this case involves important questions of federal law and national labor policy regarding the effect of National Labor Relations Board "clarification" proceedings on questions of arbitrability, which have not been, but should be, decided by this Court.

The Court of Appeals believed that the intervening Board proceedings were determinative of the question of arbitrability.

> "In this case * * * we also have the decision of the Labor Board in the clarification proceeding establishing the fact that the Humble union, the Association, is the exclusive bargaining representative of all the present Humble employees, including those formerly employed by Weber & Quinn.
>
> * * *
>
> "The consequences that flow from the Association's exclusive bargaining representation of all the Humble employees are decisive of the case." (10a-11a)

This is merely an attempt to bolster a conclusion which had already been based on the Association's presence at Humble. The Board did nothing more than sanction the recognition which Humble had already given the Association for former Weber & Quinn employees, and its decision adds no new elements to the relevant considerations.

The Board stated that it did not view the clarification proceeding as limiting employees' existing contractual rights (54a). Analysis of the nature of the proceedings shows that no such limitation would have been appropriate.

Prior to 1964 the Board entertained unit clarification proceedings to determine the bargaining unit placement of disputed categories of employees only as an adjunct to representation elections in prior or current certification proceedings. Where no question had been raised as to the representative status of a recognized but uncertified union, clarification was denied. *The Bell Telephone Company of Pennsylvania,* 118 NLRB 371 (1957). In this way, employers and unions were denied Board sanction of attempts to force categories of employees into a bargaining unit until the employees were permitted to express their desires in an election. This policy was abandoned in *Locomotive Firemen and Enginemen,* 145 NLRB 1521 (1964) which established the procedure followed in the *Humble Oil & Refining Company* clarification proceeding.

In *Locomotive Firemen and Enginemen* the Board agreed to determine unit placement with respect to an uncertified unit whether or not certification proceedings had been initiated. As a result, categories of employees may be assigned their collective bargaining representative without an election having been conducted and with no showing that the desires of the assigned employees have been considered by a substitute method. The Board found its authority for this procedure in Section 9(b) of the National Labor Relations Act (p. 4, *supra*) which concerns determination of collective bargaining units rather than in Section 9(c) (*Ibid.*) which concerns certification of collective bargaining representatives. *Locomotive Firemen & Enginemen, supra* at 1523 n. 5.

Whether employees are included in or excluded from a clarified unit depends on whether they have in the Board's

opinion been "effectively merged" by the employer into the existing recognized unit (54a). No consideration is given to their desires or to benefits and grievances available under relevant contracts.

If the Board's decision has any weight here, it supports a conclusion that *Wiley* controls. The Board found that the former Weber & Quinn employees had been "effectively merged" into the Association's bargaining unit (*Ibid.*). This Court stated in *Wiley* that

> "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. As indicated above, there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved. * * * Although Wiley was substantially larger than Interscience, relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty." 376 U. S. at 551.*

Reliance upon the Board's decision is, however, out of place.** It was based on the degree of integration of the

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* 29 of the 40 Interscience employees covered by the union contract were retained by Wiley. *Livingston* v. *John Wiley & Sons, Inc.*, 313 F. 2d 52, 54-55. Humble employed 13 of the 24 Weber & Quinn employees covered by Local 553's contracts (4a).

** The Court of Appeals' statement that the Board's order has become final and binding because it has not been challenged in the courts (10a) is unrealistic. It is well established that unit determinations made under Section 9 are not reviewable final orders. *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401. This Court stated in *Boire* v. *Greyhound Corporation*, 376 U. S. 473, that the sole exceptions to this rule have involved

former Weber & Quinn employees into Humble's organization. Unit clarification proceedings, unlike certification proceedings, provide no means for the affected employees to express their desires concerning representation or to secure protection for their accrued property rights. The Board did nothing more than acknowledge that subsequent to the accrual of the employees' property rights at Weber & Quinn, Humble had placed some of them in the Association's bargaining unit. Surely, the Board's own statement with respect to its limited inquiry is relevant.

> "Whatever Petitioner's [Humble's] obligations with respect to Local 553's contract with Weber & Quinn are, such obligations cannot operate as a bar to the inclusion of the former Weber & Quinn employees in the production and maintenance unit currently represented by Industrial on an exclusive basis." (54a)

This Court stated unequivocally in *Wiley* that

> " 'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues

admitted Board violation of a specific statutory prohibition against inclusion of professional employees in certain bargaining units (*Leedom* v. *Kyne*, 358 U. S. 184) and the applicability of United States laws to foreign-flag ships and their crews (*McCulloch* v. *Sociedad Nacional de Marineras de Honduras*, 372 U. S. 10).

Review of unit determinations may be obtained collaterally in reviews of final orders in unfair labor practice cases under Section 10(e) or 10(f) based on refusal to bargain in a unit found appropriate under Section 9. In these situations Section 9(d) provides that the record in the Section 9 proceeding be included in the record in the Section 10 proceeding. *Boire* v. *Greyhound Corporation, supra; American Federation of Labor* v. *National Labor Relations Board, supra.* There is a question, however, whether even this collateral review is available in a unit clarification case because Section 9(d) pertains only to the record in a Section 9(c) proceeding, and unit clarification petitions are processed under the authority of Section 9(b). *Locomotive Firemen & Enginemen, supra,* at 1523 n. 5.

> it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.' " 376 U. S. at 546-547.

Although the Court of Appeals acknowledged the existence of the rule (9a), it ignored the Local 553 contracts. Its primary concern was not with the existence of a contractual duty to arbitrate but with avoiding problems that might follow enforcement of that duty. A full inquiry into the nature and extent of the contractual duty was avoided by deferring to the Board's findings.

> "The consequences that flow from the Association's exclusive bargaining representation of all the Humble employees are decisive of the case." (11a).

It has been shown in the preceding section of this petition that the Court of Appeals' concern with possible inter-union conflicts was misplaced. For the same reasons, too great a reliance on the Board's decision should have been avoided. The Court of Appeals' decision amounts to saying that the courts are relieved of their traditional function of determining arbitrability as a question of contract interpretation whenever the National Labor Relations Board determines on extra-contractual grounds that a union not a party to the contract represented covered employees subsequent to the accrual of contract rights.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Supreme Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A

(Opinion of the United States Court of Appeals for the Second Circuit, January 31, 1966)

Before MEDINA, WATERMAN and HAYS, Circuit Judges.

MEDINA, C. J.: This case involves an appraisal of the extent to which the principles of *John Wiley & Sons, Inc.*, v. *Livingston*, 1964, 376 U. S. 543, are applicable where, instead of a merger, there has been a purchase of part of the business of another concern, and where there is another union representing the employees of the purchasing corporation. Judge Tenney in the Southern District of New York (247 F. Supp. 113) has held the terms of collective bargaining agreements requiring arbitration of disputes between Local 553 and Weber & Quinn, the seller, binding on Humble Oil & Refining Company, the purchaser. Humble appeals from the judgment requiring it to submit to arbitration. We reverse.

While the contentions of the parties cover a wide range, we think it necessary to discuss only two aspects of the case. First, as this is a purchase of part of a business and not a merger, are the circumstances such as to indicate that "the lack of any substantial continuity of identity in the business enterprise before and after a (the) change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved?" *John Wiley & Sons, Inc.* v. *Livingston, supra,* at p. 551. See also *Piano & Musical Instruments Workers Union* v. *W. W. Kimball Co.*, 1964, 379 U. S. 357, reversing Per Curiam, 333 F. 2d 761 (7 Cir. 1964).

We agree with the recent holdings by the Third and Ninth Circuits that the mere fact that we are here dealing with a purchase and sale rather than a merger does not of itself make the principles of *Wiley* inapplicable. *Wackenhut Corp.* v. *International Union, United Plan Guard Workers*, 1964, 9 Cir., 332 F. 2d 954; *United Steelworkers* v. *Reliance Univ., Inc.*, 3 Cir., 1964, 335 F. 2d 891. Indeed, Mr.

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Justice Harlan's opinion in *Wiley* states in so many words that the duty to arbitrate cannot be automatically removed by "a change in the corporate structure *or ownership* of a business enterprise" (376 U. S. at p. 549). (Emphasis supplied.) Nor would it seem to be decisive that the transfer was of something less than the business as a whole or of all the assets of the seller. Here, however, the precise terms of the contract of purchase and sale are not before us. Only 13 of the former employees of Weber & Quinn were integrated into the group of 260 truck drivers and 95 mechanics employed by Humble. There are other factors. For example, Local 553 might have sought protection of the rights of the former Weber & Quinn employees by prosecuting arbitration proceedings against Weber & Quinn which the proofs disclose as still in existence and functioning.

In any event, as we have decided the case on the second point, namely the theory that presence of another union at Humble, Industrial Employees Association, Inc., and the decision of the National Labor Relations Board, to which reference will be made below, makes the enforcement of the arbitration clauses as against Humble unpractical and inequitable, we do not decide whether, if there was no union representing all the employees of Humble, including those previously in the employ of Weber & Quinn, the decision to compel arbitration could be sustained. We think it better to avoid crossing that bridge until it is necessary to do so.

As we find the union features of the case dispositive of the issues, we shall now discuss the facts in some detail.

I. Prior to the transaction of purchase and sale on August 7, 1964 Weber & Quinn owned and operated a retail coal and fuel oil business at 73 Ninth Street, Brooklyn, N. Y. Burdi Fuel Co., Inc. had a similar business at 242

Central Avenue in Brooklyn. The partnership of Weber & Quinn bought out Burdi and the corporation was dissolved, but Weber & Quinn continued to use the Burdi name. There were in effect four collective bargaining agreements with the union, Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil Burner Installation, Maintenance, Servicemen and Helpers of New York City and Vicinity, Nassau and Suffolk Counties, New York, N. Y., Local Union 553, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; i.e. one agreement for drivers and one agreement for servicemen with Weber & Quinn and with Burdi. We may disregard the separate agreement with Burdi as the terms of the agreements were identical. The agreement with Weber & Quinn expired on December 15, 1965. It established Local 553 as the exclusive bargaining agent of the employees of Weber & Quinn and contained numerous provisions relative to seniority, the processing of grievances, pension and welfare rights, job security and other matters. Weber & Quinn, including Burdi, employed 10 drivers and 14 mechanics.

Humble, on the other hand, is a fully integrated oil company. In its New York Area, which included Westchester, New York City and Long Island, Humble distributes substantial quantities of gasoline, fuel oil and other petroleum products to thousands of gasoline stations, commercial establishments and homes. Deliveries are made from bulk plants where large quantities of gasoline and fuel oil are kept in storage tanks. These distribution activities are carried on principally by motor truck salesmen, truck drivers, mechanics and bulk plant operators. Since 1937 these employees have been represented by the Association above referred to. The collective bargaining agreement between Humble and the Association at the time of the purchase and sale will continue in effect

until April 30, 1966. The Association, while not certified, is made the exclusive bargaining agent for all the employees "with respect to rates of pay, wages, hours of work and other conditions of employment," and provision is made for the modification of the agreement prior to its date of expiration, upon 15 days' notice by Humble or by the union. This collective bargaining agreement also contains numerous provisions affecting seniority, the processing of grievances and job security. In addition, provision is made for disability protection, retirement annuities and other welfare benefits. As of December 31, 1964 this agreement covered 518 employees. Of these 260 are truck drivers and 95 are mechanics in the New York area.

The agreement of purchase and sale contained an express disclaimer by Humble of any obligations of Weber & Quinn to its employees, whether arising out of collective bargaining agreements or otherwise; and it contained no promise on the part of Humble to employ the former employees of Weber & Quinn. What Humble bought was "certain assets," including some trucks and equipment, but "principally" the Weber & Quinn fuel oil accounts in Brooklyn. Of the 10 Weber & Quinn drivers, 4 voluntarily entered the employ of Humble. Of the 14 Weber & Quinn mechanics, 9 voluntarily entered the employ of Humble. In his opinion denying the motion of Local 553 for a temporary injunction Judge Sugarman found:

> "Certain other Weber-Quinn employees either refused an offer of employment from Humble or failed to pass Humble's regular physical examination and were not hired."

The process of integrating the former Weber & Quinn employees into the Humble organization had been planned in advance and was consummated immediately after the

closing. The trucks were removed and repainted, and none of the employees formerly covered by the Local 533 agreements were kept on the premises of Weber & Quinn after August 7, 1964. Interim arrangements were made for receiving orders over the telephone, and receipts for deliveries bearing the names of Weber & Quinn and Burdi were used for a time, solely for certain accounting purposes connected with the terms of the sale.

Local 553 promptly demanded arbitration. As the arbitration clause[1] of the Local 553 agreements provided for arbitration by a designee of the New York State Board of Mediation, the items claimed to be the subject of arbitration are set forth in a letter of September 10, 1964 to the Board from counsel for Local 553. The judgment appealed from directs the parties to proceed to arbitration "of the disputes noticed for arbitration before the New York State Board of Mediation on September 10, 1964,"

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[1] ARBITRATION

Section 15: Should any difference or dispute arise during the life of this agreement regarding the meaning, interpretation, or application of any of the provisions of this agreement, or regarding any other grievance which may arise between the parties, which cannot be adjusted by the representatives of Local 553, I. B. of T., and the concerned Employer and/or the concerned Employer association, the same is to be submitted to arbitration. Either party to the dispute may place the disputed issue in arbitration by request for arbitration in writing served upon the other party and upon the New York State Mediation Board within ten (10) days from the last date of attempted negotiated settlement between the parties. The New York State Mediation Board shall appoint one of its staff mediators as the Arbitrator and shall arrange for arbitration of the matter in dispute.

and we have set forth in the margin the letter of September 10, 1964, in which 26 items of dispute are enumerated.[2]

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[2]

COHEN and WEISS
Counsellors At Law
605 Third Avenue
New York 16, N. Y.

Samuel J. Cohen
Henry Weiss

MUrray Hill 2-6077

Jack Last

Herbert A. Levy
Bruce H. Simon

September 10, 1964

New York State Board Board of Mediation
270 Broadway
New York, N. Y.

Re: Local 553 and Weber and Quinn

Gentlemen:

This office represents Local Union No. 553 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Disputes have arisen between the Union on the one hand and Humble Oil Co. and Humble Oil and Refining Co., on the other, over the failure of these companies to recognize their obligations under the Union's Fuel Oil Contract 1964-1965 and Servicemen's, Installation Men's, Installation Men's Helpers, and Servicemen Trainees' Contract 1964-1965. Section 15 of both of the above contracts provides that any disputes shall be referred to a staff arbitrator to be appointed by the New York State Mediation Board. Accordingly, would you please appoint an arbitrator to hold a hearing regarding the following disputes and advise this office and the companies of the hearing date.

The employees whose rights are affected by the companies' refusal to recognize their obligations under the above contract are presently being denied numerous benefits to which they are entitled. Such denial constitutes a substantial hardship, and it is therefore requested that an early hearing date be selected. Note that the Fuel Oil Contract provides that the arbitrator shall hear the dispute within five days from the date of referral to the Board unless otherwise agreed by the parties.

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Humble's refusal to arbitrate was followed on December 23, 1964 by the commencement of this action to compel Humble to submit to arbitration, pursuant to Section 301

The companies have refused to recognize any of their obligations under the collective bargaining agreements. This refusal includes, but is not limited to the following:

1. Refusal to recognize Local 553 as the exclusive bargaining agent for employees formerly employed by Weber & Quinn and by Burdi Fuel Co., Inc.

2. Refusal to pay the wages provided in the contracts.

3. Refusal to observe the hours of work provisions of the contracts.

4. Refusal to observe the procedures for payment of wages provided in the contracts.

5. Refusal to allocate work assignments in a manner consistent with the seniority provisions of the contracts.

6. Refusal to observe the shift schedules provided in the contracts.

7. Refusal to observe the contractual procedure for replacing employees on the seniority list.

8. Refusal to pay the wages provided in the contracts for Sunday work and overtime work.

9. Refusal to require employees covered by the contracts to become and remain members of Local No. 553 on and after 30 calendar days following the beginning of employment.

10. Refusal to maintain trucks and equipment operated by employees covered by the contracts in proper condition as required by the contracts.

11. Refusal to follow the contractual procedures for filling vacancies in jobs covered by the contracts.

12. Refusal to observe the contractual procedures for the hiring of trucks and other equipment.

13. Refusal to require all work within the categories covered by the contracts to be performed by employees working under and in compliance with the contracts.

14. Refusal to observe the sub-contracting provisions of the contracts.

15. Refusal to recognize the right of Union representatives to visit the Companies' premises.

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of the Labor-Management Relations Act of 1947, as amended, 29 U. S. C., Section 185. On January 20, 1965

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16. Refusal to recognize the rights of employees to refuse to cross picket lines.

17. Refusal to provide the holidays set forth in the contracts and to pay the wages required for holiday work.

18. Refusal to grant vacations in accordance with the provisions of the contracts.

19. Refusal to recognize the rights of employees relating to workmen's compensation insurance, personal injuries insurance, and public liability insurance.

20. Refusal to provide the payments required by the contracts during an employee's absence from work due to appearances in court.

21. Refusal to make the payments required by the contracts during an employee's absence from work pursuant to traffic violations summonses.

22. Refusal to provide the insurance and welfare benefits set forth in the contracts, including group life insurance; accidental death and dismemberment insurance, occupational and non-occupational; weekly benefits for non-occupational accident or sickness not covered by workmen's compensation; the Limited Medical Expense Policy; surgical-medical insurance; dental benefits; payments under the Union Optical Plan; Associated Hospital Service coverage; contributions to the Local 553 Hospitalization Trust Fund; and other insurance and welfare benefits set forth in the contracts.

23. Refusal to recognize their personal liability for failure to provide the above insurance and welfare benefits.

24. Refusal to make payments to the Local 553 Pension Fund.

25. Refusal to recognize the authority of the Fuel Industry Union and Management Committee to settle certain disputes as provided in the contracts.

26. Refusal to compensate employees for use of their own cars and for loss of tools as provided in the Servicemen's, Installation Men's, Installation Men's Helpers', and Servicemen Trainees' Contract 1964-1965.

Very truly yours,

COHEN AND WEISS
By /s/ Stanley M. Berman
STANLEY M. BERMAN

SMB:AM
cc: Humble Oil Co.
Humble Oil and Refining Co.

Appendix A

Humble filed with the National Labor Relations Board a petition for clarification "of the appropirate bargaining unit represented by the Association, so as to make clear that such unit includes the former employees of Weber." On July 11, 1965 the Board granted Humble's petition and ruled that the former Weber & Quinn employees being "effectively merged * * * into the New York unit currently represented by Industrial (the Association) * * * cannot now be considered a separate appropirate unit." *Humble Oil & Refining Co.*, 1965, 153 NLRB No. 111. Although expressly disavowing any view on the question of Humble's contractual obligations to Local 553, the Board held that the Association is now the exclusive bargaining representative of the former Weber & Quinn employees.

II. It is elementary in these arbitration cases that *in limine* the court shall decide whether there is a duty to arbitrate. That is precisely the question before us. The only differentiating feature is that, instead of interpreting the language used in a particular arbitration clause of a written contract, we are now fashioning a feature of federal labor law in the context of the policy to be deduced from an integration of the various relevant Acts of the Congress and the decisions of the courts in the field of labor law. Just as *Wiley* broke new ground and did so in the light of the existing body of federal law on the subject, so must we now put the strands of this case together and arrive at a reasoned conclusion consistent with the spirit and tenor of the principles already developed. In the light of *Wiley* we do not see how we can arrive at any other conclusion than that to direct arbitration here would disturb the harmony of the existing body of federal labor law and tend to foster rather than prevent industrial strife and unrest.

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It is the failure of the court below to realize that all the facts, including the union features of the case, are to be taken into consideration in deciding the primary and controlling question of whether or not there is an obligagation or "agreement" to arbitrate binding on Humble that led to the judgment that we are constrained to reverse.

We begin with footnote 5 at page 551 of 376 U. S., in *Wiley*:

> "The fact that the Union does not represent a majority of an appropriate bargaining unit in *Wiley* does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises. *Retail Clerks Int'l Assn., Local Unions Nos. 128 & 633* v. *Lion Dry Goods, Inc.*, 369 U. S. 17. There is no problem of conflict with another union, cf. *L. B. Spear & Co.*, 106 NLRB 687, since Wiley had no contract with any union covering the unit of employees which received the former Interscience employees."

In this case we not only have another union representing the Humble employees; we also have the decision of the Labor Board in the clarification proceeding establishing the fact that the Humble union, the Association, is the exclusive bargaining representative of all the present Humble employees, including those formerly employed by Weber & Quinn. This order of the Labor Board has not been challenged in the courts, and so it has become final and binding on all concerned. Moreover, it would seem not necessary to do more than to mention in passing that the order of the Labor Board in the clarification proceeding was made in the exercise of its primary and exclusive jurisdiction.

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The consequences that flow from the Association's exclusive bargaining representation of all the Humble employees are decisive of the case.

A. If the judgment below should be affirmed and the arbitration proceedings commence, there would be an obvious conflict between the interests of the Humble employees as a whole and the interests of the 13 Humble employees who formerly worked for Weber & Quinn. If it be assumed that in the arbitration proceeding Local 553 would continue to represent the former employees of Weber & Quinn, it is not unlikely that they would press for an award giving these employees preferential treatment in the matter of seniority, job security, working conditions and other benefits that would adversely affect the other Humble employees. The result might well be unrest and dissatisfaction among the vast majority of workers in the plant. Such a burdening of the collective bargaining relationship is clearly to be avoided, as a matter of national labor policy. The combination of the two unions, one representing all the employees and the other representing a minority, is on its face an anomaly. Indeed, a mere glance at the 26 enumerated items of dispute proposed for arbitration will show that perhaps the principal purpose behind this action is to preserve the status of Local 553 as at least in some respects the bargaining representative of the former Weber & Quinn employees.

It is no answer to say, as does Local 553, that the Association's collective bargaining agreement will not expire until April 30, 1966 and that there will be nothing for the Association to bargain about with Humble until that agreement is about to terminate. The bargaining process is a continuing affair. The agreement of the Association itself provides for modification during the term of the agreement on 15 days notice by either side. The processing of grievances is also an integral part of the entire scheme of the collective bargaining. The arbitration of the 26 disputes

demanded by Local 553 could be a source of endless exacerbation and conflict for all concerned.

B. But, in view of the decision of the Labor Board in the clarification proceeding, it is not even clear that Local 553 would be entitled to represent the former employees of Weber & Quinn before the arbitrator. Thus an order to Humble to arbitrate might force Humble to commit an unfair labor practice by "bargaining" with a minority union when a majority union is in existence. See *Modine Mfg. Co.* v. *Grand Lodge Int'l Ass'n of Machinists,* 6 Cir., 1954, 216 F. 2d 326; *American Seating Co.*, 1953, 106 NLRB 250; cf. *Glendale Mfg. Co.* v. *Local 520*, 4 Cir., 1960, 283 F. 2d 936, cert. denied, 1961, 366 U. S. 950; *Hughes Tool Co.* v. *NLRB,* 5 Cir., 1945, 147 F. 2d 69; *Hotel Corp. of Puerto Rico, Inc.,* 1963, 144 NLRB 728. But cf. *Douds* v. *Local 1250*, 2 Cir., 1949, 173 F. 2d 764. Compare *Black-Clawson Co.* v. *International Ass'n of Machinists Lodge 355,* 2 Cir., 1962, 313 F. 2d 179; *Plasti-Line, Inc.* v. *NLRB,* 6 Cir., 1960, 278 F. 2d 482.

Arbitration of grievances is clearly a part of the collective bargaining process as defined in Section 8(d) of the National Labor Relations Act:

> "(T)o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to * * * the negotiation of an agreement, *or any question arising thereunder.* * * * " 29 U. S. C., Section 158(d) (emphasis added).

Indeed, in the course of its discussion of the favored place arbitration occupies in our national labor policy, the Supreme Court has recognized that "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."

United Steelworkers v. *Warrior & Gulf Navig. Co.*, 1960, 363 U. S. 574-578. See also *Ostrofsky* v. *United Steelworkers*, D. C. Md., 1959, 171 F. Supp. 782, 790, aff'd, 1960, 273 F. 2d 614, cert. denied, 363 U. S. 849.

A duty of the employer under the Act is to bargain with the collective bargaining representative of a majority of the employees in the unit. 29 U. S. C., Section 158(a)(5). Such representative, moreover, has the right to be bargained with exclusively; the duty to bargain with the employees' agent under Section 8(a)(5) imposes "the negative duty to treat with no other." *NLRB* v. *Jones & Laughlin Steel Corp.*, 1937, 301 U. S. 1, 44; 29 U. S. C., Section 159(a); see *Modine Mfg. Co.* v. *Grand Lodge Int'l Ass'n of Machinists, supra*, 216 F. 2d 326; cf. *American Seating Co., supra*, 106 NLRB 250; *Admin. Ruling of NLRB General Counsel*, Case No. F-1132, 1959, 44 L. L. R. M. 1338. And this duty to bargain applies whether the collective-bargaining representative is certified or not. See 29 U. S. C., Sections 158(a)(5), 159(a); *Irving Air Chute Co.* v. *NLRB*, 2 Cir., 1965, 350 F. 2d 176.

Conclusion

Thus we conclude that, because of the union features of this case, there is no implied or constructive duty or agreement on the part of Humble to arbitrate with Local 553 any of the 26 items in controversy. The complaint is dismissed.

We express no opinion relative to the rights of Local 553 against Weber & Quinn.

Reversed.

APPENDIX B

(Opinion of the United States District Court for the Southern District of New York, September 30, 1965)

TENNEY, J.: Plaintiffs move herein, in their official capacities, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, "for the relief requested in the complaint."

In the complaint as drawn, plaintiffs not only request an order directing defendant to arbitrate certain grievances arising under named collective bargaining agreements, but also request that defendant be restrained from pursuing any activities contrary to the provisions of the respective agreements; in effect, a request for specific performance of the collective bargaining agreement provisions. In the view taken of the instant case, defendant will be directed to proceed to arbitration. However, as a necessary corollary of that order is the fact that the continued vitality, if any, of the provisions in question is a matter for the arbitrator to decide. *United Steelworkers* v. *Reliance Universal, Inc.*, 335 F. 2d 891, 895 (3rd Cir. 1964). Accordingly, the "other" relief requested will be denied, and, as defendant suggests, the within motion will be treated as one for partial summary judgment, pursuant to Rule 56(d) of the Federal Rules of Civil Procedure.

The factual setting of the instant controversy is not disputed and is fully set forth in an opinion by Judge Sugarman, dated February 17, 1965 (opinion No. 30887). The facts are similarly set forth in a decision by the National Labor Relations Board, *Humble Oil & Ref. Co.*, 153 NLRB No. 111 (July 8, 1965). Therefore, for background, the following is sufficient:

On August 7, 1964, defendant Humble Oil & Refining Company (hereinafter referred to as "Humble") purchased the fuel oil delivery service and installation busi-

ness of Weber & Quinn and its subsidiary, Burdi Fuel Oil Co., Inc. (hereinafter collectively referred to as "Weber & Quinn"), both of whom had collective bargaining contracts, effective January 1, 1964, through December 15, 1965, with Local 553 of the Teamsters Union (hereinafter referred to as "Local 553" or as "plaintiff"). At that time, plaintiff was recognized under the "Fuel Oil Contracts" with each company as the bargaining representative for the chauffeurs employed and, under the "Servicemen's Contract", as representative for the service, installation men and installation men's helpers. Both prior and subsequent to the purchase, plaintiff made known to defendant its status and requested defendant to acknowledge its obligations under the aforesaid contracts, which defendant refused to do.

In September of 1964, plaintiff, pursuant to the identical arbitration clause in the respective contracts, sought to arbitrate a number of disputes arising out of some 26 categories of alleged refusals by defendant to accede to the demands of plaintiff, in violation of the contracts.[1] De-

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[1] The following are the categories listed:

1. Refusal to recognize Local 553 as the exclusive bargaining agent for employees formerly employed by Weber & Quinn and by Burdi Fuel Co., Inc. (In view of the National Labor Relations Board's decision in the unit clarification proceedings, *Humble Oil & Ref. Co.*, 153 NLRB No. 111 (July 8, 1965) Items 1 and 9 may no longer be arbitrable, but the Court makes no determination on this point.)
2. Refusal to pay the wages provided in the contracts.
3. Refusal to observe the hours of work provisions of the contracts.
4. Refusal to observe the procedures for payment of wages provided in the contracts.
5. Refusal to allocate work assignments in a manner consistent with the seniority provisions of the contracts.

fendant has refused to arbitrate these disputes, contending that the collective bargaining agreements are not binding upon it.

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6. Refusal to observe the shift schedules provided in the contracts.

7. Refusal to observe the contractual procedure for replacing employees on the seniority list.

8. Refusal to pay the wages provided in the contracts for Sunday work and overtime work.

9. Refusal to require employees covered by the contracts to become and remain members of Local No. 553 on and after 30 calendar days following the beginning of employment. (In view of the National Labor Relations Board's decision in the unit clarification proceedings, *Humble Oil & Ref. Co.,* 153 NLRB No. 111 (July 8, 1965), Items 1 and 9 may no longer be arbitrable, but the Court makes no determination on this point.)

10. Refusal to maintain trucks and equipment operated by employees covered by the contracts in proper condition as required by the contracts.

11. Refusal to follow the contractual procedures for filling vacancies in jobs covered by the contracts.

12. Refusal to observe the contractual procedures for the hiring of trucks and other equipment.

13. Refusal to require all work within the categories covered by the contracts to be performed by employees working under and in compliance with the contracts.

14. Refusal to observe the sub-contracting provisions of the contracts.

15. Refusal to recognize the right of Union representatives to visit the Companies' premises.

16. Refusal to recognize the rights of employees to refuse to cross picket lines.

17. Refusal to provide the holidays set forth in the contracts and to pay the wages required for holiday work.

18. Refusal to grant vacations in accordance with the provisions of the contracts.

19. Refusal to recognize the rights of employees relating to workmen's compensation insurance, personal injuries insurance, and public liability insurance.

20. Refusal to provide the payments required by the contracts during an employee's absence from work due to appearances in court.

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Defendant, a Delaware corporation, is engaged in the production, refining and distribution of petroleum products throughout the United States. Since 1937 its distribution employees have been represented for collective bargaining purposes by the Industrial Employees Association, Inc. (hereinafter referred to as the "Association"), with whom defendant presently has a contract expiring April 30, 1966.

Weber & Quinn employed 14 mechanics and 10 drivers. As of this date it appears that 9 of these mechanics (8 burner service mechanics and 1 truck mechanic) and 4 truck drivers have been employed by Humble. Other employees of Weber & Quinn either have refused the offered employment or failed to pass defendant's physical examination.

The dispute between the parties relates to the legal consequences flowing from the above-cited facts.

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21. Refusal to make the payments required by the contracts during an employee's absence from work pursuant to traffic violations summonses.

22. Refusal to provide the insurance and welfare benefits set forth in the contracts, including group life insurance; accidental death and dismemberment insurance, occupational and non-occupational; weekly benefits for non-occupational accident or sickness not covered by workmen's compensation; the Limited Medical Expense Policy; surgical-medical insurance; dental benefits; payments under the Union Optical Plan; Associated Hospital Service coverage; contributions to the Local 553 Hospitalization Trust Fund; and other insurance and welfare benefits set forth in the contracts.

23. Refusal to recognize their personal liability for failure to provide the above insurance and welfare benefits.

24. Refusal to make payments to the Local 553 Pension Fund.

25. Refusal to recognize the authority of the Fuel Industry Union and Management Committee to settle certain disputes as provided in the contracts.

26. Refusal to compensate employees for use of their own cars and for loss of tools as provided in the Servicemen's, Installation Men's, Installation Men's Helpers, and Servicemen Trainees' Contract 1964-1965.

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The defendant does not appear to seriously question the arbitrability of the issues sought to be arbitrated herein, *qua* arbitrable issues *in vacuo*, but asserts that in the factual setting here presented it is not bound by the collective bargaining agreements entered into between Local 553 and Weber & Quinn, and is equally not bound by the arbitration clause contained therein, nor required to arbitrate any disputes arising therefrom.

Accordingly, the issue squarely presented is whether Humble is bound by the collective bargaining agreements entered into between plaintiff and Weber & Quinn, or at least the arbitration clause contained therein, the issue of how much of the contract is binding being left to the arbitrator.

In support of its action to compel defendant to arbitrate under a collective bargaining agreement it concededly never signed or assumed, plaintiff relies, *inter alia*, on *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964) and two decisions following it, *United Steelworkers* v. *Reliance Universal, Inc.*, 335 F. 2d 891 (3d Cir. 1964) and *Wackenhut Corp.* v. *International Union United Plant Guard Workers*, 332 F. 2d 954 (9th Cir. 1964).

In opposition, defendant contends that *Wiley* is inapplicable by reason of the lack of any substantial continuity of identity between Weber & Quinn and itself, and that, as distinguished from *Wiley*, in the instant case the successor company has a union representing its employees and to arbitrate with Local 553 would be to dilute the status of the Association as collective bargaining representative of Humble employees. In addition, it argues that by reason of the National Labor Relations Board's decision in the unit clarification proceeding hereinafter discussed Local 553 no longer represents the prior Weber & Quinn employees and therefore lacks any standing to advance these grievances.

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Arbitration is, of course, a matter of contract and a party cannot be required to submit to arbitration any dispute which it has not agreed to submit. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582 (1960). Whether or not the company is bound to arbitrate, as well as what issue it must arbitrate, are matters to be determined by the Court on the basis of the contract entered into by the parties. *Atkinson* v. *Sinclair Ref. Co.*, 370 U. S. 238, 241, 1962).

Similarly, "[t]he duty to arbitrate being of contractual origin a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." *Wiley, supra*, at 547.

Accordingly, the initial task of this Court is to determine whether the duty to arbitrate has survived the purchase and has devolved upon Humble under the prior executed collective bargaining agreements. In approaching this question I leave to the side for the moment the presence of another union, the Association, a factor not presented in *Wiley*.

In *Wiley*, Interscience Publishers had entered into a collective bargaining agreement with a union representing some of its employees. During the life of the contract, Interscience was merged into Wiley, a much larger publishing house, most of Interscience's employees being retained by the successor firm. The union was unable to agree with Interscience, and later with Wiley, as to the effect of the merger on the collective bargaining agreement. The union asserted that under the agreement its members had certain "vested rights" regarding seniority, severance

pay and pension fund payments. Wiley would not recognize the union as a bargaining agent and declared that the agreement had terminated with the merger. The union demanded arbitration of its grievances and, when Wiley refused, sued to compel arbitration.

Wiley's position in opposing the union demand, as described by one commentator, "was quite simple. It has not agreed to either the contract or the obligation to arbitrate contained therein and the union plainly was not the representative of a majority of its employees. That position . . . seemed well founded on the consistent rulings of the NLRB and the federal courts that a collective bargaining agreement does not survive either a change of representatives or as in this case, a basic change in the identity of the employer absent some affirmative adoption of the old agreement by the new party. [Citing: *NLRB* v. *Armato,* 199 F. 2d 800 (7th Cir. 1952); *International Longshoremen's Union* v. *Juneau Spruce Corp.,* 189 F. 2d 177 (9th Cir. 1951); aff'd, 342 U. S. 237 (1952); *American Seating Co.,* 106 NLRB 250 (1953); *Cruse Motors, Inc.,* 105 NLRB 242 (1953); *Stonewall Cotton Mills,* 80 NLRB 325 (1948); *Herman Lowenstein, Inc.* 75 NLRB 377 (1947)]." Christensen, Labor Relations Law, 1964 Ann. Surv. American Law, 155, 156-57.

The Supreme Court, referring to the strong preference for arbitral settlement of industrial disputes, held that "the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement and that in appropriate circumstances present here the successor employer may be required to arbitrate with the union under the agreement." 376 U. S. at 548.

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Defendant, in an attempt to distinguish *Wiley*, cites the following language:

> "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. As indicated above, there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." (*Id.* at 551.)

Defendant then argues that in the case at bar there is lacking this substantial identity in the business enterprise.

The facts, however, bearing in mind the rationale for the Supreme Court's decision, would appear to lead to a contrary conclusion.

Weber & Quinn and Burdi were engaged in the sale of fuel oil, as is the defendant. In *Wiley*, both employers were engaged in the publishing business.

In both *Wiley* and in the case at bar, the successor employer is a larger concern than its predecessor, and in both cases the successor utilized the physical plant and equipment of its predecessor. At the time of demand for arbitration and institution of suit, Humble untilized Weber & Quinn's office in Brooklyn, but it has since been closed. Weber & Quinn's panel and delivery trucks are being used by Humble, though they have been repainted and moved either to its Brooklyn or Queens offices. The former Weber & Quinn employees who have been hired are now working out of Humble's offices, and in that sense have been integrated into Humble's existing structure. In *Wiley*, as well, the employees hired were transferred to the Wiley plant and presumably once there were not segregated from the Wiley employees but were integrated into the work force.

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(The union in *Wiley* represented 40 employees in the Interscience plant, 29 of whom went to work for Wiley and were "absorbed" into the larger Wiley work force of 380. Affidavit of Francis Lobdell, *Livingston* v. *John Wiley & Sons, Inc.*, 62 Civ. 378). In addition, they perform the same tasks as when they worked for Weber & Quinn. Insofar as billing is concerned, pursuant to the contract of purchase the former Weber & Quinn accounts are segregated and billed on special billing forms which refer to Weber & Quinn as a division of Humble Oil & Refining Company, and the address printed thereon is the address of the Weber & Quinn & Burdi Brooklyn offices, respectively. The accounts, though, are serviced the same as the other Humble accounts.

The Supreme Court laid down no guidelines to define when a successor employer, due to the lack of substantial continuity of identity with its predecessor will not be held to a duty to arbitrate. However, it has been observed that "only unusual circumstances will relieve a successor firm from a duty to arbitrate grievances arising out of its predecessor's contract." The Supreme Court 1963 Term, 78 Harv. L. Rev. 179, 288 (1964). I am of the opinion that the point of reference in successor employer situations arising in the context of continued viability of an arbitration clause, as opposed to the claim of a certified union for continued representative rights, or even the claim of a union for continued bargaining rights, is not the physical location of the employing industry and the fact that the employees are working out of different offices with different supervisors, but rather the similarity in work performed by the employee, the similarity in the employing industry, and in the employment relationship. As noted above, all of these criteria are present in the instant case.

Thus, for example, in *Piano & Musical Instrument Workers Union* v. *W. W. Kimball Co.*, 333 F. 2d 761 (7th Cir.), rev'd, 379 U. S. 357 (1964) (per curiam), the defend-

ant manufacturer was engaged in the business of manufacturing pianos and organs at its plant at Melrose Park, Illinois. The collective bargaining agreement with plaintiff union was entered into on October 1, 1960 and expired October 1, 1961. On August 15, 1961, defendant notified plaintiff that it was discontinuing its operation in Melrose Park and that it would begin laying off employees immediately. The defendant transferred its manufacturing operations to a new plant at French Lick, Indiana, and on October 9, 1961, began hiring employees for the French Lick plant.

Under the collective bargaining agreement there was provision made for seniority rights of certain employees for a period of two years following lay-off. Discussions between plaintiff and defendant both prior and subsequent to October 1, 1961, relating to the rehiring of the Melrose Park employees at the French Lick plant were of no avail. On July 30, 1962, plaintiff offered to submit the "disputed issues" to arbitration, which offer was refused by defendant and suit was commenced on September 14, 1962.

The Court distinguished *Wiley* as follows:

> "A study of Wiley reveals a mere absorption by Wiley of Interscience. This was accomplished by Interscience offering to its employees in its only plant located in New York City, jobs at the Wiley plant located *in the same city*. . . .
>
> In the case at bar a transfer of defendant's employees from a Chicago suburb to Southern Indiana would be drastic if not difficult. . . . [333 F. 2d at 764]. [I]t is clear in [*Wiley*] . . . that while an Interscience employee might have gotten on the Wiley payroll by reporting for duty at the Wiley plant the day after he completed his last day's work at the Interscience plant without any movement of the place of residence of himself and family, in the

> case at bar a transfer from defendant's Chicago plant to its French Lick plant necessarily would involve in most cases the uprooting of a man's family from the community in which it lived and its transportation with its personal belongings to a new community in a home to be secured and a readjustment of the relations of the employee and his family to new neighbors, church and social connections there, a life in a community rural in its nature in contrast to that under which the family had lived in metropolitan Chicago." (*Id.* at 765.)

Based on the foregoing factors, the Court held that "[t]he operation at French Lick from the standpoint of the employees was relevantly dissimilar from the operation in Chicago." (*Ibid.*)

Applying that criteria to the case at bar of course necessitates the conclusion that there is sufficient continuity of identity.

In addition, the Court held that while there were discussions prior to the termination of the contract between plaintiff and defendant about the rights of the employees to be employed at French Lick, there was no specific reference during those discussions to the seniority status of the Melrose Park employees with respect to the availability of job opportunities at the French Lick plant and no request by plaintiff that Melrose Park employees be offered employment at the French Lick plant upon a seniority basis. The Court noted that the "difference" between the parties arose on October 9, 1961, when new employees were hired at the French Lick plant, at a point in time subsequent to the expiration of the collective bargaining agreement. Thus the Court held that there was no "difference" during the course of the agreement re-

lating to seniority rights and that, therefore, there was no "difference" which became a proper subject of arbitration.[2]

The Supreme Court, however, in a *per curiam* opinion, stated:

> "The petition for a writ of certiorari is granted and the judgment is reversed. *Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564, and *Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543." *Piano & Musical Instrument Workers Union* v. *W. W. Kimball Co.*, 379 U. S. 357 (1964).

Returning to the factual similarities between *Wiley* and the case at bar (see 10-11, *supra*), can this Court hold that the factual pattern herein presents the "unusual" case where there is such a "lack of any substantial continuity of identity in the enterprise" so as to make *Wiley* inapplicable? I think not, for the rationale underlying the Supreme Court's decision in *Wiley* which forged new ground in employer-employee relationships, is equally applicable in the instant case.

The focal point of reference is the employee who is doing the same type of work, in the same industry in the same city, but for a different employer. Viewed from this standpoint, his "well being" was as incidental to the purchase by Humble as were the interests of the Interscience employees at the time of merger, and the possibility of his being disadvantaged was at least as great as well. Indeed the reasoning of the Supreme Court in *Wiley* that employee rights and interests are often affected by changes in corporate ownership but are largely ignored by those effecting such changes, is no less persuasive in the case at bar. The "rights" that the former Weber & Quinn employee has asserted through his representative are as

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[2] The decision is criticized in Christensen, Labor Relations Law, 1964 Ann. Surv. American Law 155, 158-59.

vested or unvested as those of the Interscience employees, but his right to at least arbitrate their continued viability stands on the same footing as those of the Interscience employees. He is equally in need of the same protection as that accorded in *Wiley.* He, through his representative, sought to ensure certain rights by entering into a collective bargaining agreement, variously described "not [as] an ordinary contract . . . [But rather as a] 'generalized code' ", (*Wiley, supra,* at 550) covering the entire relationship, or as the common law of the shop, a piece of legislation enacted by a society—the industrial community —to govern that community. (58 L. R. R. 234.) The agreements between plaintiff as representative of Weber & Quinn employees and Weber & Quinn date back to 1933 and have been renewed continuously thereafter.

Neither plaintiff nor its members took part in the purchase negotiations and understandably those negotiations involved more the well-being of the selling and purchasing employer than the employee upon whom the sale perhaps had the greatest impact. These employees, through Local 553,[3] now assert that certain rights under those agreements are vested and due and owing them notwithstanding the change of ownership which Humble asserts *eo instanti* severed those rights, and I am of the opinion that at least the right of these employees to arbitrate these grievances was not severed by the sale and that the duty to arbitrate devolved upon Humble.

Bearing in mind the utility of the arbitration process and its ability to adapt as the circumstances require, and the considerations that were of prime importance to the Court in *Wiley,* I hold that there is a sufficient continuity of identity presented herein between the prior employer and Humble as to impose upon Humble the duty provided by

[3] The representative status of Local 553 will be discussed *infra.*

the agreements, to arbitrate disputes arising thereunder. I thus find an insufficient factual difference between *Wiley* and the case at bar as to require me to reach a different conclusion than the one reached therein.

Nor do I consider the presence of the "Association",[4] the union representing Humble employees, or the Board's decision on the unit clarification petition, of sufficient importance to lead to a conclusion contrary to the one I have reached herein.

At the time the demand for arbitration was made and suit instituted, Local 553 represented the former Weber & Quinn employees and as of that time accordingly represented the employees covered by the agreement which is in dispute and out of which Humble's duty to arbitrate arises. Cf., *Wiley, supra,* at 551 n. 5; *Truck Drivers & Helpers Union* v. *Grosshans & Peterson, Inc.,* 209 F. Supp. 164, 168, 169 (D. Kans. 1962); notes 8, 10, *infra.* In addition, the rights of former Weber & Quinn employees, not hired by Humble, are also being pressed herein. See also *Chemrock Corp.,* 151 NLRB No. 111 (March 28, 1965).

The Supreme Court in *Wiley, supra,* at 551-52 n. 5, stated that "[t]here . . . [was] no problem of conflict with another union, cf., *L. B. Spear & Co.,* 106 NLRB 687, since Wiley had no contract with any union covering the unit of employees which received the former Interscience employees."

Under *Wiley,* Humble—by reason of the circumstances already alluded to—became a party to the code that governed the employment relationship between Weber & Quinn and its employees, represented by Local 553. The presence of the Association, while a factor that may be considered by the arbitrator, in no way lessens the impact of the

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[4] Research has failed to reveal any post-*Wiley* decision wherein the successor employer's employees were represented by another labor organization.

business transaction on these employees and in no way dilutes the rights that they assert exist and the lack of recognition which they seek to arbitrate. At the most, the presence of the Association is a factor to be weighed in determining whether "other considerations [are so] compelling" (*Wiley, supra,* at 549-50) as to overcome "the preference of national labor policy for arbitration as a substitute for tests of strength between contending forces." (*Ibid.*) However, viewing the transaction as I have from the standpoint of the employee with alleged rights, caught in the middle of a business transaction, I do not believe that it is a sufficient consideration to outweigh the rationale for the Supreme Court's striking out into *"terra incognita"* in the *Wiley* decision.

> "Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by 'the relative strength . . . of the contending forces,' *Warrior & Gulf, supra,* at 580." *Wiley, supra,* at 549.

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The presence of the Association would thus appear to go more to the remedy to be shaped by the arbitrator than to the preclusion of the right to assert the grievances and arbitrate the existence or non-existence of rights under the collective bargaining agreement.

The reason for the developing preference for the resolution of labor controversies by way of arbitration is best revealed by the arbitrator's decision in *S. B. Penick & Co.*, 43 Lab. Arb. 798 (March 3, 1964).

The issue there posed involved an attempt by a union to extend and enforce rights such as seniority, severance pay and pension plan (*id.* at 803) which became vested under a contract with Parsons, the predecessor employer, against another company—Penick—which bought out Parsons and moved the operation to its own plant as soon as the collective bargaining agreement expired. In addition to the *Wiley* problem thus presented was the additional complicating factor that Penick's own employees were represented by another union.

The opinion by arbitrator Turkus, in which he cites and discusses the Court of Appeals opinion in *Wiley* (*Livingston* v. *John Wiley & Sons, Inc.*, 313 F. 2d 52 (2d Cir. 1963), and its impact on the problem before him (and on the basis of which he held the duty to arbitrate to have survived the purchase and the issues presented arbitrable) demonstrates the usefulness of arbitration as a grievance procedure and the full range and spectrum of tools at the arbitrator's disposal in reaching an equitable resolution of the problems presented.

There is, of course, a possibility, as the Supreme Court noted in *Wiley*, that "[p]roblems might be created by an arbitral award which required Wiley to give special treatment to the former Interscience employees because of

rights found to have accrued to them under the Interscience contract. But the mere possibility of such problems cannot cut off the union's rights to press the employees' claim in arbitration. While it would be premature at this stage to speculate on how to avoid such hypothetical problems, we have little doubt that within the flexible procedures of arbitration a solution can be reached which would avoid disurbing labor relations in the Wiley plant." *Wiley, supra,* at 551-52n. 5.

Similarly, in the case at bar, it is conceivable that an award on the grievances presented would create "problems" due to the presence of the Association; however, to presume that such will be the fact is to ignore the Court's mandate in *Wiley.*

With respect to the Board's decision in the petition for unit clarification, it is not dispositive of the issues presented.

The Court, in the hope that the Board's decision would cast some light on this developing and shadowy area of law, stayed its hand until that decision was rendered. The Board, however, specifically and quite explicitly limited its decision to placing the former Weber & Quinn employees into "the production and maintenance unit currently represented by Industrial [the Association] on an exclusive basis." (153 NLRB No. 111 at 3.) With respect to the problem before this Court, the Board cryptically stated:

> "Whatever Petitioner's [Humble's] obligations with respect to Local 553's contract with Weber & Quinn are, such obligations cannot operate as a bar" to the inclusion of the former Weber & Quinn employees in the Association unit. (*Ibid.*) "Similarly, Local 553's contractual right to arbitrate disputes from its relationship with Weber & Quinn does not preclude the Board from determining a

question concerning the appropriateness of a unit for the purposes of collective bargaining." (*Ibid.*)

The Board thus seemingly drew a distinction between the contractual rights of Local 553 and the former Weber & Quinn employees vis-a-vis Humble, and the status of the Association and the former Weber & Quinn employees vis-a-vis Humble "for the purposes of collective bargaining." Indeed, the Supreme Court in *Wiley* stated:

> "[W]e do not suggest any view on the questions surrounding a certified union's claim to continued representative status following a change in ownership. See *e.g., Labor Board* v. *Aluminum Tubular Corp.*, 299 F. 2d 595, 598-600; *Labor Board* v. *McFarland*, 306 F. 2d 219; *Cruse Motors, Inc.*, 105 NLRB 242, 247. This union does not assert that it has any bargaining rights independent of the Interscience agreement; it seeks to arbitrate claims based on that agreement . . . not to negotiate a new agreement." (*Id.* at 551.) See also *Livingston* v. *John Wiley & Sons, Inc.*, 313 F. 2d 52, 57 n. 3 (2d Cir. 1963); note 8, *infra.*

The decision of the Board as plainly stated held that the former Weber & Quinn employees are to be considered in the Association unit for collective bargaining purposes. It did not, however, discuss Humble's contractual obligations to these employees as presented by their representative who negotiated the contract on their behalf.

The procedure, pursuant to which the Board undertook to clarify the unit in the instant case was one recently adopted (*Brotherhood of Locomotive Firemen & Enginemen*, 145 NLRB 1521 (1964), which overruled prior established procedure and precedent (*The Bell Telephone Co.*, 118 NLRB 371 (1957)). This newly-adopted procedure permits a petition for unit clarification, though the unit

in which the clarification is sought has not been certified by the Board.

The impact of this new procedure and the effect of the *Brotherhood of Locomotive Firemen & Enginemen* decision, *supra,* have not as yet been ascertained (see, *e.g., Crown Zellerbach Corp.,* 147 NLRB 1223 (June 30, 1964); *New Fashion Cleaners, Inc.,* 152 NLRB No. 16 at 5 n. 7 (May 5, 1965)), and Humble has not shown either by citation or argument that an administrative decision on a unit clarification petition in a non-certified unit is in any way analogous to the decertification of a collective bargaining representative. See, *e.g., Glendale Mfg. Co.* v. *Local 520 ILGWU,* 283 F. 2d 936 (4th Cir. 1960),[5] cert. denied, 366 U. S. 950 (1961); *International Telephone & Telegraph Corp.* v. *Local 400, Int'l Union of Elec. Workers,* 59 LRRM, 3033 (D. N. J. July 9, 1965); but cf., *United Elec. Workers* v. *Star Expansion Indus., Inc.,* 56 LRRM 2286 (S. D. N. Y. April 13, 1964).[6]

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[5] In *Glendale,* the decertified union was seeking to act as the collective bargaining representative of the employees concerning the matter of negotiation of wages pursuant to a reopening clause in the agreement, and, in fact, the arbitrator's award directed both the employer and the decertified union to negotiate and "bargain on the subject of the employees' wages" (*id.* at 933)—a situation quite dissimilar from that presented herein.

[6] Indeed, the entire rationale behind the decision in the decertification cases, namely, that a majority of the employees have, by way of election, repudiated their representative and have chosen another to represent them, and the resultant effect of decertification on the right of the decertified representative to continue to press the rights of employees, is wholly inapplicable in the instant case. For in our case the Association is not a certified union and therefore, there has been no election under the aegis of the NLRB and, more important, treating these employees as accretions to the Association unit, they will come under the Board rule denying a self-determination election to employees held to be accretions to an existing unit. See *Borg-Warner Corp.,* 113 NLRB 152 (1955), petition to review denied sub nom. *International Union, United Auto Workers* v. *NLRB,* 231 F. 2d 237, 243 (7th Cir.), cert. denied, 352 U. S. 908 (1956); *Radio Corp. of America,* 141 NLRB 1134 (1963).

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Moreover, in none of those cases was a *Wiley* situation presented and, accordingly, none had the opportunity to decide the possible impact of *Wiley* on the problem. And, in fact, there is a growing tendency after *Wiley* to bind a successor company to part if not all of the predecessor's duties. See *Chemrock Corp.*, 151 NLRB No. 111 (March 28, 1965); NLRB General Counsel's "Report on Case-Handling Developments at NLRB", Quarter Ending Dec. 31, 1964, 58 L. R. R. 105, 108-09, in which the General Counsel concludes that a successor employer who continues the predecessor's business with a continuity of identity must not only bargain with the union which represented the predecessor's employees but must also give continued effect to the predecessor's labor contract; see also *Wirtz* v. *Ocala Gas Co.*, 336 F. 2d 236 (6th Cir. 1964). Indeed, due to the impact of *Wiley*, the Board may very well have to re-examine its entire section 9 procedure and, in the process, overrule many time-honored precedents.[7]

Plaintiff does not desire to negotiate a new contract with Humble nor does it desire to represent these former Weber & Quinn employees *in futuro*. That, the Board has

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[7] In a paper delivered at the Eighteenth Annual Conference on Labor, sponsored by the New York University Institute on Labor Relations, Sol G. Lippman, Esq., presages that *Wiley* will cause a fundamental change in the Board's representation case policies in successorship situations. 58 L. R. R. 234. The papers of M. Lippman and of the other participants who discussed the *Wiley* problem (Joseph Barbash; David Feller; John E. Jay) are shortly to be published. The first of the Board's time-honored precedents which may have fallen is the *General Extrusion* doctrine (*General Extrusion Co.*, 121 NLRB 1165 (1958)), wherein the Board held that a contract with the predecessor will not bar an election after a sale unless the successor employer has "bound himself to assume the bargaining agreement." See *Grainger Bros. Co.*, 146 NLRB 609 (1964); compare *Triumph Sales, Inc.*, 154 NLRB No. 71 (Sept. 5, 1965) at 4 n. 8, 5 n. 12.

held, is the function of the Association. What plaintiff does desire is to submit certain grievances to arbitration on behalf of its members who had chosen it to be their representative and to press claims on their behalf under an agreement that plaintiff negotiated and to which it was a party on behalf of and representing these employees—an agreement which is still viable and binding on Humble.[8] It cannot definitively be said that the present and/or future status of the Association as representative of these employees will be impaired if Local 553 is per-

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[8] In *Trumbull Asphalt Co.*, 38 Lab. Arb. 103 (1962), a union was held to be entitled to represent employees in arbitration of a grievance where the grievance arose and the arbitrator was appointed prior to a decertification election. The Board of Arbitrators, after distinguishing, *inter alia*, *Glendale*, *supra*, and differentiating between grievance adjustment and collective bargaining (citing *Hughes Tool Co.* v. *NLRB*, 147 F. 2d 69 (5th Cir. 1945) and the parties to assert the grievances (citing *Douds* v. *Local 1250 Retail Wholesale Dep't Store Union*, 173 F. 2d 764 (2d Cir. 1949)), stated in language apposite to a consideration of the equities herein:

> "[T]he union was the designated collective representative when the grievance arose . . . the rights involved arose out of an existing collective agreement are vested, and the union may therefore lawfully vindicate these rights. In addition to legal considerations, allowing the union to perform this function has much to be said for it from both a practical as well as an equitable basis. The union negotiated the agreement and its provisions would be familiar terrain. Its knowledge of the provisions, their history and intent, would be superior to that of a successor union, or to that of the individual employees. Its experience with the grievance machinery, and its knowledge of the attitude and approach of company personnel would give it an important advantage over a successor union or individual employees. Moreover, the damage by loss of momentum or complete denial of rights because of time or other procedural requirements is obviated." (Id. at 1098.)

See also *In re Busch Jewelry Co.*, 19 Lab. Arb. 65 (1952).

mitted to arbitrate on behalf of its members the existence of prior allegedly vested rights.

Conceivably a problem may arise, as a result of the award, but it need not be anticipated and in the event that problems do arise, they can, of course, be dealt with when the arbitrator's award is sought to be confirmed. The possibility of problems is, of course, no reason to deny the requested relief sought herein. All these issues are in the first instance for the arbitrator and it must not be assumed by this Court that he will exceed his authority.

Accordingly, in view of *Wiley's* rationale and developing progeny, it may very well be that at least for the limited purpose of arbitrating grievances arising from allegedly subsisting and vested contract rights, the union which held bargaining rights with the predecessor and negotiated the agreement which has been held to be binding on the successor, continues to represent the predecessor employees for the limited purpose of arbitration of grievances arising from the breach of those rights, and to that extent a vestige remains of the representative status of the predecessor organization. If that be the case where there is no union in the successor company's plant, I believe that the same should hold true in the instant case where the distinguishing feature is the presence of another union, now held by the Board to be the collective bargaining representative of these employees.[9] To hold otherwise by reason of the Board's decision is to overlook the presence of the same equities as were pre-

[9] Mention should also be made of those employees not hired by Humble whose interests can only be protected by plaintiff. In addition, I should also note the obviously difficult position that the Association would be in, in prosecuting rights of the Weber & Quinn employees which may conflict with the rights of their members, and the fact that its desire to press these rights may understandably be less than that of Local 553.

sented in *Wiley* and to deprive these employees, not only of an opportunity to have their chosen representative press their claims, but perhaps of an opportunity to press their claims at all.[10]

One point remains for decision, namely, whether the entire agreement devolved upon Humble and/or whether the Court is the forum wherein to adjudicate the issue.

The problem was succinctly stated and resolved in *United Steelworkers* v. *Reliance Universal, Inc.*, 335 F. 2d 891 (3d Cir. 1964), as follows:

> "The opposing parties have argued for and against the proposition that the collective bargain-

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[10] Indeed, it is highly questionable whether a representative other than Local 553 (such as the Association) can even assert these grievances.

In *United Electrical Workers* v. *Star Expansion Indus. Inc.*, 56 L. R. R. M. 2286 (S. D. N. Y. April 13, 1964), the issue presented was whether a union newly certified as the exclusive bargaining agent of a group of employees previously represented by another, can displace the employee representative in an arbitration proceeding under a collective bargaining agreement with the prior union or whther the prior union signatory to the contract retains the right to process the grievance.

The Court noted that the duty to arbitrate is contractual in origin (citing, *inter alia, Wiley, supra*) and that since an employer has no obligation to arbitrate in the absence of a contractual obligation the duties of the parties rest entirely upon the agreement. However, the Court noted the subsequently certified union has no agreement (*i.e.*, was not a party to this agreement) and its status as newly-certified bargaining representative implies future responsibilities and looking to the formulation of a new contractual relationship.

Thus, the Court stated that the newly-certified union could not assert these rights under a contract to which it is a complete stranger (citing *Local 1545, United Bhd. of Carpenters* v. *Vincent*, 286 F. 2d 127, 131 n. 5 (2d Cir. 1960)). Accordingly, the Court held that the employer should continue the arbitration with the party best suited to present the employees' grievances in their best light, *i.e.*, the predecessor union.

ing agreement is unqualifiedly binding upon Reliance, as would have been the case if there had been an assignment or novation substituting Reliance as a party to the instrument. But, in the *Wiley* case, the Supreme Court seems to have been careful to avoid so broad a ruling. It merely reasoned and decided that federal labor law imposed upon a succeeding proprietor a duty to arbitrate those questions which his predecessor was bound to arbitrate under his labor contract. The fact that the plant covered by the labor contract had been closed and its employees mingled with other workers with independent and perhaps different rights at another plant may well have influenced this careful limitation of the *Wiley* holding.

In any event, we find implicit in the guarded language of the *Wiley* opinion, recognition and concern that new circumstances created by the acquisition of a business by a new owner may make it unreasonable or inequitable to require labor or management to adhere to particular terms of a collective bargaining agreement previously negotiated by a different party in different circumstances. Although the pre-existing labor contract indicates the structure of labor relations and the established practice of the shop at the beginning of the new proprietorship, an arbitrator of a subsequent complaint charging unwarranted departure from that scheme may properly consider any relevant new circumstances arising out of the change of ownership, as well as the provisions of and practices under the old contract, in achieving a just and equitable settlement of the grievance at hand. The requirements of the contract remain basic guides to the law of the shop, but the arbitrator may find that equities inherent in changed circumstances

require an award in a particular controversy at variance with some term or terms of that contract. We do not imply that any departure from what was established under the old contract is justified by any special circumstances of this case. We do not know. And, in any event, this is a matter for the arbitrator's determination.

While this is not spelled out in the *Wiley* case, the power heretofore recognized in arbitrators to achieve justice in situations not contemplated by or not adequately covered in an existing collective bargaining agreement leads us to believe that analogous power exists here. Cf. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 1960, 363 U. S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424. And see Cox Reflections on Labor Arbitration, 1959, 72 Harv. L. Rev. 1482, 1493-1498.

Our conclusion, therefore, is that the 1962 collective bargaining agreement, as an embodiment of the law of the shop, remained the basic charter of labor relations at the Bridgeville plant after the change of ownership. But, in the arbitration of any grievance asserted thereunder, the arbitrator may properly give weight to any change of circumstances created by the transfer of ownership which may make adherence to any term or terms of that agreement inequitable."

Similarly, in the case at bar, I merely hold that the grievances are arbitrable under an arbitration clause that survived the purchase, and devolved upon Humble, and that plaintiff is the party to press those grievances. The disputes noticed, absent the purchase, would have been

arbitrable under the agreement. "It would be inconsistent with our holding that the obligation to arbitrate survived the merger were we to hold that the fact of merger without more removed claims otheawise plainly arbitrable from the scope of the arbitration clause." (*Wiley, supra,* at 554.) However, I do not hold that the rights from whose breach the grievances arose survived the purchase and are binding upon Humble, or that the entire collective bargaining agreement survived the purchase. To decide that issue is to grant specific performance of the collective bargaining agreement and to usurp the function of the arbitrator. It is for him to fashion a remedy "in light of the fully developed facts" (*Wiley, supra,* at 555), taking into consideration if he is so inclined "any change of circumstances created by the [purchase] . . . which make adherence to any term or terms of that agreement inequitable." *United Steelworkers, supra,* at 895.

Accordingly, the motion for summary judgment insofar as it requests a direction for defendant to proceed to arbitrate the disputes heretofore noticed, is granted and otherwise denied.

Settle order on notice in conformity herewith.

APPENDIX C

(Opinion of the United States District Court for the Southern District of New York, February 17, 1965)

SUGARMAN, *D. J.*:

On December 21, 1964 James McGuire, as President, and Joseph Diovisalvo, as Secretary-Treasurer of Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil Burner Installation, Maintenance, Servicemen and Helpers of New York City and vicinity, Nassau and Suffolk Counties, New York, N. Y. Local Union No. 553, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein Local 553) filed a complaint against Humble Oil & Refining Company (herein Humble).

Jurisdiction is based on 28 U. S. C. § 1337 and the action is brought pursuant to § 301 of the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. § 185.

After alleging that Local 553 is a labor organization representing employees in, and Humble is a company engaged in, the fuel oil industry, the complaint alleges that a New York partnership, Weber & Quinn, and a New York corporation, Burdi Fuel Co., Inc., both also engaged in the fuel oil industry, each entered into two collective bargaining contracts with Local 553, effective January 1, 1964 through December 15, 1965 (herein the contract or contracts). It is alleged that Local 553 was recognized as the bargaining representative for the chauffeurs under the "fuel oil contract" with each company and for the servicemen, trainees, installation men and installation men's helpers under the "servicemen's contract" with each company.

It is then alleged that the contracts each required arbitration of any difference or dispute arising during the life of the contract as to the meaning, interpretation or application of any of the provisions of the contract or any other grievance which might arise between the parties to the contract and which could not be adjusted by the representatives of Local 553 and the employer.

Appendix C

Since the interests of Weber & Quinn and Burdi Fuel Co., Inc. appear to be identical, they will be henceforth referred to as Weber & Quinn in most instances.

The complaint then alleges that Humble purchased the business of Weber & Quinn in August 1964 and since then has been carrying on the fuel oil delivery, service and installation formerly carried on by Weber & Quinn. It is alleged that although Local 553 demanded that Humble recognize and comply with the provisions of the collective bargaining contracts between Local 553 and Weber & Quinn, Humble refused to do so, whereupon Local 553 demanded arbitration by an arbitrator designated by the New York State Board of Mediation, allegedly in accordance with the terms of the contracts but that Humble refused to submit the dispute to arbitration, hereby endangering the employment rights of the employees covered by the contracts, to the irreparable injury, loss and damage to Local 553.

The complaint then requests that Humble be directed to proceed to arbitration and be restrained from pursuing activities contrary to the provisions of the contracts with respect to certain claimed rights of employees and Local 553 arising thereunder.

The parties have stipulated that Humble's time to answer the complaint be extended until the determination of the instant motion.

One day after the complaint was filed, Local 553 moved for a preliminary injunction requiring Humble to proceed to arbitrate 26 alleged violations of the collective bargaining contracts.

It appears from the moving papers that the fuel oil contracts and the servicemen's contracts contain identical language as follows:

"ARBITRATION

"SECTION 15: Should any difference or dispute arise during the life of this agreement regarding the

meaning, interpretation, or application of any of the provisions of this agreement, or regarding any other grievance which may arise between the parties, which cannot be adjusted by the representatives of Local 553, I. B. of T., and the concerned Employer and/or the concerned Employer association, the same is to be submitted to arbitration. Either party to the dispute may place the disputed issue in arbitration by request for arbitration in writing served upon the other party and upon the New York State Mediation Board within ten (10) days from the last date of attempted negotiated settlement between the parties. The New York State Mediation Board shall appoint one of its staff mediators as the Arbitrator and shall arrange for arbitration of the matter in dispute."

The "Arbitration" section of the fuel oil contracts differ slightly from the "Arbitration" section of the servicemen's contracts as to proceedings thereafter but these differences are of no importance on this motion.

The plaintiffs base their right to preliminary injunctive relief upon assertions in the moving papers that the contracts between Local 553 and Humble's predecessors fixed wages and defined benefits and working conditions of drivers and servicemen employed by Weber & Quinn; that after Humble acquired Weber & Quinn's accounts, Humble continued to operate the businesses substantially as before, using the same premises, trucks, equipment and delivery slips whereon Weber & Quinn (and Burdi Fuel Co., Inc. where appropriate), was designated as a "Division of Humble Oil Co."; that since Humble's acquisition of the businesses and because of Humble's refusal to recognize its obligations under the contracts, including that of arbitrating disputes,

(i) Certain named employees of Weber & Quinn were denied employment by Humble despite their

being on seniority lists of Weber & Quinn which entitled them to employment,

(ii) Humble has required former employees of its predecessors now employed by Humble, to work under a seven-day per week work schedule as against a five-day per week work schedule under the contracts,

(iii) Humble has failed to provide former employees of its predecessors who went into Humble's employ with the welfare benefits covered by the contracts,

(iv) Humble has failed to provide former employees of its predecessors who went into Humble's employ with the pension benefits enjoyed by them under the contracts,

(v) Humble has failed to assign work to the former employee of its predecessors who went into its employ in accordance with the seniority provisions of the contracts;

that Humble required those of the former employees of its predecessors who became employed by it to become members of Industrial Employees Association, Inc. (herein the Association), a labor organization other than Local 553, and in violation of the contracts; that all of the foregoing constitute irreparable injury and damage to the former employees of Weber & Quinn and to Local 553.

The plaintiffs also predicate their right to preliminary injunctive relief on the following history of events:

When on August 6, 1964 Local 553 learned that Humble was to take over the busines of Weber & Quinn (and Burdi Fuel Co., Inc.) it, through its attorney, requested Humble through one of the attorneys in its legal department, to acknowledge its obligations under the contracts which

Humble declined to do. On August 7th that request was put in writing by the attorney for Local 553 in a letter addressed to Humble.

Subsequently, and after learning that Humble had actually taken over the conduct of the business of Weber & Quinn and on September 10, 1964 Local 553, through its attorneys, wrote the New York State Board of Mediation asking for the appointment of an arbitrator to hear disputes between Local 553 and Humble arising out of 26 categories of alleged refusals by Humble to accede to demands of Local 553, in violation of the contracts.

Thereupon, and on September 14, 1964, the New York State Board of Mediation advised Local 553's attorneys and Humble of the names of five persons available for the selection of one for designation as an arbitrator.

Thereafter, and on September 15, Humble wrote the New York State Board of Mediation, declining to make such selection of an arbitrator and objecting to further proceedings before the Board.

On its part Humble, in opposition to the plaintiff's motion shows the following facts:

Humble is a fully integrated oil company, engaged in the production, refining and distribution of petroleum and products produced therefrom. Those distribution operations in the New York area which this action involves are managed and directed from Humble's regional office located in Pelham, N. Y.

Humble's customers in the New York area include many thousands of gasoline stations, commercial establishments and homes. Humble supplies gasoline and heating oil to those customers from so-called bulk plants, where the products are stored in large tanks. The physical work involved in distributing the products from those tanks to Humble's customers is performed principally by plant men who operate the bulk plants, motor tank salesmen, truck drivers who deliver the gasoline and fuel oil, and

mechanics who service Humble's trucks and plant facilities and its customers' heating equipment.

Since 1937, those employees engaged in Humble's distribution activities in New York have been represented for purposes of collective bargaining by the Association. The existing contract between Humble and the Association (herein the agreement) is dated March 20, 1963, and by its terms will continue in effect until April 30, 1966. Under the agreement, Humble recognizes the Association as exclusive bargaining agent for all of its plant men, drivers and mechanics, including both regular and non-regular employees. The Association has been authorized by a majority of such employees so to represent them.

The agreement at present covers 518 employees in the State of New York. Those include in the Westchester, New York City and Long Island districts (Greater New York area), 260 truck drivers and 95 mechanics. Humble's largest bulk plant in the New York area is located at 320 Freeman Street, Brooklyn (Brooklyn bulk plant), from which deliveries are made to lower manhattan, Brooklyn and Queens. Of the employees assigned to work at or out of that plant, 147 are truck drivers and 30 are mechanics. In addition, there are 55 mechanics in the Greater New York area who service customers' heating equipment, including customers in Brooklyn and Queens. Those mechanics receive their assignments either from Humble's' office at Pelham or at Maspeth, L. I. All of the mechanics and drivers are covered by the agreement between Humble and the Association.

When on August 7, 1964 Humble purchased from Weber & Quinn (and its subsidiary Burdi Fuel Co., Inc.) certain assets connected with their fuel oil business, Humble knew that there were in force collective bargaining contracts between Weber & Quinn and Local 553, effective January 1, 1964, through December 15, 1965, by which Local 553 was recognized as exclusive bargaining agent for the truck

drivers and mechanics employed by Weber & Quinn and accordingly Humble's purchase agreement with Weber & Quinn specifically provided that Humble did not assume any obligations under the collective bargaining contracts between Weber & Quinn (and Burdi Fuel Co., Inc.) and Local 553.

Of the total consideration payable by Humble to Weber & Quinn under the purchase agreement, the principal amount was allocated to payment for its fuel oil customer accounts. The purchase agreement also provided for an adjustment of the price paid for such accounts based upon a comparison of actual sales with the sales volumes represented by Weber & Quinn and for the payment of additional consideration if the adjusted sales of Humble to former Weber & Quinn accounts for the year ending 18 months after the closing should exceed 90% of the adjusted sales of Weber & Quinn to said accounts for the last year preceding the closing.

It has been, and is, Humble's regular policy, when it purchases a smaller business, to integrate such business with that of Humble as rapidly as possible. That integration policy is followed in order to eliminate overlapping and duplication in sales and service functions and to achieve the greater efficiency and economy which is possible in a large integrated organization.

Plans for the integration of Weber & Quinn fuel oil customer accounts were formulated before the purchase agreement was executed and carried out commencing immediately after closing. All the delivery trucks purchased were repainted to delete the name of Weber & Quinn on August 8, 1964. The trucks were removed from the Weber & Quinn premises to Humble's Brooklyn bulk plant and were housed there commencing August 8, 1964. The trucks were then dispatched from that bulk plant for delivery schedules which combined the accounts purchased from

Weber & Quinn with Humble's 7,000 previous heating oil accounts in the New York district, i.e., Brooklyn, Queens, and lower Manhattan.. Also commencing on August 8, 1964, all service calls from former Weber & Quinn accounts were handled by mechanics reporting to Humble's Maspeth bulk plant, from which mechanics are sent daily to cover such service calls.

Although Humble did not obligate itself to employ any of the persons working for Weber & Quinn, Humble did in fact offer employment to certain members of Local 553. Weber & Quinn employed 14 mechanics and 10 drivers. As of December 31, 1964, 9 of those mechanics and 4 of those drivers were employed by Humble. Certain other Weber & Quinn employees either refused an offer of employment from Humble or failed to pass Humble's regular physical examination and were not hired.

While Humble retained an office staff at the premises of Weber & Quinn, the purpose of maintaining such office has been to accept telephone sales and service calls, to receive payment of bills from customers, and to serve as a sales office for Humble salesmen. All calls received from oil deliveries are relayed to Humble's regular dispatchers, while calls for service are turned over to mechanics assigned from Humble's Maspeth bulk plant to cover them that day. None of the employees formerly covered by the Local 553 contracts were kept at the premises of Weber & Quinn after August 7, 1964.

Humble is now in the process of closing its office at the premises of Weber & Quinn entirely and centralizing the handling of sales and service calls by means of a direct telephone line to Humble's Pelham office although the former Burdi office will be continued for the use of Humble's Brooklyn salesmen.

Humble has continued to use billing forms separately identifying the accounts purchased from Weber & Quinn in

order to comply with the purchase agreement, under which, part of the price for those accounts is dependent upon the amount of sales by Humble to such accounts for 18 months following the purchase. When the 18-month accounting period is completed, Humble plans to discontinue entirely any distinction between its own pre-existing accounts and the accounts it purchased from Weber & Quinn.

All of the former Weber & Quinn employees now working for Humble are included within the coverage of the agreement. It appears that such employees are now being paid on a higher wage scale and receiving greater "fringe benefits" than were formerly available to them under the Local 553 contracts.

Although, as stated in the papers in support of the motion, Humble in writing disclaimed any obligation to recognize or arbitrate with Local 553 on September 15, 1964, plaintiffs took no further action until this suit was commenced on December 21, 1964.

Because the demand by Local 553 that Humble recognize it as exclusive bargaining agent for former Weber & Quinn employees creates a conflict with Humble's duties under its existing collective bargaining agreement with the Association and its duties under the NLRA, Humble, on January 20, 1965, filed a petition with the NLRB seeking an administrative determination as to whether the existing bargaining unit of Humble appropriately includes the former Weber & Quinn employees who are now working in such unit.

The whole basis for temporary injunctive relief appears to be contained in the 10th and 11th paragraphs of the affidavit of Ray Hintze, business agent of Local 553, in support of the motion. Those paragraphs read:

> "10. Upon information and belief: Since the acquisition of said businesses, the employees covered by said contracts have suffered irreparable injury

and damage solely by reason of defendant's failure and refusal to comply with the terms of said contracts. Said injury and damage includes but is not limited to the following:

A. The following employees have been denied employment by defendant even though they were on the seniority lists of Weber & Quinn and were therefore entitled to employment under the terms of said contracts:*

(i) Fuel Oil Drivers:

Mike Terrantino
John Bowman
Anthony De Santis
Philip Astorita
Robert Cash

(ii) Servicemen:

Arthur Swanstrom
Meyer Bloom

B. Defendant has required said employees who have been employed by it to work pursuant to a seven day per week work schedule although said contracts provide for a five day work week.

C. Defendant has failed to provide said employees who have been employed by it with the welfare benefits provided in said contracts.

D. Defendant has failed to provide said employees who have been employed by it with the pension benefits required by said contracts.

---

* Humble's answering papers state that De Santis, Astorita and Cash were seasonal employees of Weber & Quinn who refused similar employment offered by Humble and the other four were offered regular employment but failed Humble's pre-employment physical examination.

E. Defendant has failed to assign work to said employees employed by it in accordance with the seniority provisions of said contracts.

11. Upon information and belief: Defendant has required said employees employed by it to become members of a labor organization other than the Union in violation of said contracts with the Union."

These alleged wrongs are of course substantially less than the 26 categories upon which the original demand for arbitration by a designee of the New York State Board of Mediation was made by Local 553 on September 10, 1964.

Stripped of the vague conclusions, admittedly on information and belief unsupported by any recital of supporting facts, alleged in paragraphs 10B, C, D, E and 11 because of their clear insufficiency to warrant the relief sought, the motion must stand or fall on the hearsay recitals in paragraph 10A. Even if it be accepted that the named drivers and servicemen were "denied" employment, that still would not constitute such irreparable injury as to warrant the broad relief sought pendente lite.

I am unaware of any reason why actions under § 301 of the Labor-Management Relations Act of 1947, 29 U. S. C. § 185, should be treated differently from other actions between private litigants in this court. Plaintiffs seek a preliminary injunction requiring the defendant to take affirmative action tantamount to the full measure of relief plaintiffs would ultimately obtain by a final adjudication in their favor. Such power is sparingly exercised, 7 Moore's Federal Practice (2d ed.) 1627, and then only on a very strong showing of need therefor which is obviously utterly lacking here.

The present posture of this case does not permit a determination of what in essence is a premature motion for summary judgment made by the plaintiffs before defendant

has answered, under the guise of a motion for a preliminary injunction.

The motion is denied and it is so ordered. This decision shall constitute the court's findings of fact, conclusions of law and order. No further order is necessary.

SIDNEY SUGARMAN
United States District Judge

Dated: New York, New York
February 17, 1965

APPENDIX D

(Decision and Order of the National Labor Relations Board, July 8, 1965)

HUMBLE OIL & REFINING COMPANY,

Petitioner,

and

INDUSTRIAL EMPLOYEES ASSOCIATION, INC.,[1]

Union,

and

LOCAL UNION NO. 553, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,[2]

Union.

DECISION AND ORDER

Upon a Petition for Clarification duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before Jordan Ziprin, Hearing Officer. All parties appeared and were given full opportunity to participate at the hearing. Thereafter, Petitioner and Local 553 filed briefs in support of their respective positions.

The National Labor Relations Board has considered the Hearing Officer's rulings made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

[1] Hereinafter called Industrial.

[2] Hereinafter called Local 553.

Appendix D

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.

3. Petitioner, a Delaware corporation, is engaged in the production, refining, and distribution of petroleum products throughout the United States. Petitioner's employees in the New York State area currently are, and for a number of years have been, represented by Industrial in a unit of production and maintenance employees, including delivery truck operators, motor tank salesmen, plantmen, sales agents, plant helpers, mechanics, and mechanical helpers. On August 7, 1964, Petitioner purchased the assets of Weber & Quinn and its subsidiary Burdi Fuel Co., Inc., in Brooklyn, New York. At that time Local 553 represented Weber & Quinn's truckdrivers and mechanics under a collective-bargaining agreement to terminate in December 1965. Pursuant to its policy of integrating into its existing structure newly acquired smaller businesses, Petitioner closed Weber & Quinn's office on April 2, 1965. All panel and delivery trucks formerly owned by Weber & Quinn were repainted to delete the latter's name and were moved either to Petitioner's Brooklyn or Queens offices. Of Weber & Quinn's 14 mechanics and 10 drivers, 9 mechanics, including 8 burner service mechanics and 1 truck mechanic, and 4 drivers were employed by Petitioner. The 4 drivers and the truck mechanic were relocated at Petitioner's Brooklyn office where they work with Petitioner's other drivers and mechanics. Similarly, the 8 burner service mechanics work out of Peti-

tioner's Queen's office. Thus, the former Weber & Quinn employees work out of the same locations, service the same accounts, work for the same supervisors, are subject to the same labor relations policies, are paid from the same office, and have the same interests in wages and working conditions as the other drivers and mechanics of Petitioner.

Petitioner now seeks to include in the existing contractual unit the above employees previously employed by Weber & Quinn. Local 553 has moved to dismiss the petition on the grounds: (1) that Petitioner as successor to Weber & Quinn is bound by the terms of the latter's contract with Local 553; (2) that Local 553 has filed a complaint with the United States District Court for the Southern District of New York, requesting the court to compel the Petitioner to arbitrate certain disputes arising out of its current contract with Local 553. For the reasons stated below, Local 553's motion is hereby denied.

It is clear from the record that Petitioner has effectively merged the former Weber & Quinn employees into the New York unit currently represented by Industrial. These employees cannot now be considered a separate appropriate unit. Whatever Petitioner's obligations with respect to Local 553's contract with Weber & Quinn are, such obligations cannot operate as a bar to the inclusion of the former Weber & Quinn employees in the production and maintenance unit currently represented by Industrial on an exclusive basis. Similarly, Local 553's contractual right to arbitrate disputes arising from its relationship with Weber & Quinn does not preclude the Board from determining a question concerning the appropriateness of unit for the purposes of collective bargaining. We shall therefore grant the Petitioner's petition.

Appendix D

ORDER

IT IS HEREBY ORDERED that the Petitioner's petition for clarification of its existing production and maintenance unit in the New York area be, and it hereby is, granted.

Dated, Washington, D. C., July 8, 1965.

.....
JOHN H. FANNING, Member

.....
GERALD A. BROWN, Member

.....
HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX E

(Judgment of the United States Court of Appeals for the Second Circuit—January 31, 1966)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of January, one thousand nine hundred and sixty-six.

Present:

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
Circuit Judges.

JAMES McGUIRE, as President, and JOSEPH DIOVISALVO, as Secretary-Treasurer of Coal, Gasoline, Fuel Oil Teamsters, etc.,

Plaintiffs-Appellees,

v.

HUMBLE OIL & REFINING COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix E

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs to the appellant.

A. DANIEL FUSARO,
Clerk.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1265

JAMES McGUIRE, as President and JOSEPH DIOVI-SALVO, as Secretary-Treasurer of COAL, GASOLINE, FUEL OIL TEAMSTERS, CHAUFFEURS, OIL BURNER INSTALLATION MAINTENANCE, SERVICEMEN AND HELPERS OF NEW YORK CITY AND VICINITY, NASSAU AND SUFFOLK COUNTIES, NEW YORK, N. Y., LOCAL UNION NO. 553, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

HUMBLE OIL & REFINING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN H. MORSE,
Counsel for Respondent,
1 Chase Manhattan Plaza,
New York, New York 10005.

HARRY H. VOIGT,
MELVYN FREEMAN,
CRAVATH, SWAINE & MOORE,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JAMES MCGUIRE, as President and JOSEPH DIOVISALVO, as Secretary-Treasurer of COAL, GASOLINE, FUEL OIL TEAMSTERS, CHAUFFEURS, OIL BURNER INSTALLATION MAINTENANCE, SERVICEMEN AND HELPERS OF NEW YORK CITY AND VICINITY, NASSAU AND SUFFOLK COUNTIES, NEW YORK, N. Y., LOCAL UNION No. 553, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

HUMBLE OIL & REFINING COMPANY,

Respondent.

No. 1265

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

COUNTER-STATEMENT OF THE QUESTION PRESENTED

We regard Petitioners' version of the Questions Presented (Pet., p. 3), and particularly Question No. 1, as a distortion of the facts upon which the case was decided

below. A more appropriate statement of the issue is as follows:

Is an employer which (i) purchases a part of the assets of another concern, (ii) does not assume, and expressly disavows, any obligation under the selling concern's collective bargaining agreements with the union which represented its employees and (iii) employs certain of the selling concern's former employees in a collective bargaining unit covered by an existing agreement with a union representing all the employees in that unit, bound to arbitrate grievances asserted under the agreements between the selling concern and the union which represented its employees?

STATUTES INVOLVED

In addition to the statutes cited in the Petition, we invite the Court's attention to Section 8(d) of the National Labor Relations Act (the Act), 49 Stat. 449 (1935), as amended, 29 U. S. C. §§ 151, *et seq.*

Section 8 (d) of the Act, in relevant part, provides:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

FACTS*

Petitioners' Statement of the Case (Pet., pp. 5-7) contains only one parenthetical citation to the record. That is not surprising, because Petitioners have in a number of instances made purported statements of fact which have no support in the record. For example, there is no support in the record for Petitioners' assertion that employees were "transferred" from Weber & Quinn to Humble (Pet., p. 6). Similarly, there is no evidence in the record to support Petitioners' assertion that Industrial Employees Association, Inc. (Association), the union recognized by Humble, is a "company union" (*ibid.*). We invite the Court's attention to the following statement of the facts which is supported by the record:

Prior to August 7, 1964, certain employees of Weber & Quinn (a partnership operating a retail coal and fuel oil business in Brooklyn, New York) were covered by collective bargaining agreements between Petitioners' union (Local 553) and Weber & Quinn** (Pet., pp. 2a-3a, 15a, 45a-46a). Those agreements contained arbitration provisions (Pet., pp. 5a, 15a, 41a-42a).

On August 7, 1964, Humble Oil & Refining Company (Humble) purchased from Weber & Quinn its fuel oil accounts and certain other of its fuel oil assets (Pet. pp. 2a, 14a-15a, 45a).

---

*A detailed account of the facts is set forth in the District Court opinions dated February 17 and September 30, 1965, the National Labor Relations Board decision dated July 8, 1965, and in the Court of Appeals opinion dated January 31, 1966, all of which may be found in Appendices C, B, D and A, respectively, of the Petition.

**The following citations are to the appendix to the Petition, which appendix contains the decisions of the District Court, the National Labor Relations Board and the Court of Appeals.

Weber & Quinn continued thereafter in the coal business and received payments from Humble for a period of 18 months after the date of purchase (Pet. pp. 2a-4a, 13a, 14a, 46a, 48a).

Humble has for many years been engaged in the fuel oil business in and around New York. In that business it employs approximately 500 employees, some of whom perform work similar to the work formerly performed by the Weber & Quinn employees. Those Humble employees are in a collective bargaining unit which, since 1937, has been represented by the Association (Pet. pp. 3a-4a, 17a, 45a, 53a).

Humble intended to integrate any Weber & Quinn employees whom it employed into its long-established bargaining unit of New York employees (covered by the Association's agreement with Humble dated March 20, 1963) and, therefore, Humble did not assume, and in the purchase agreement expressly disavowed, any obligation under the Weber & Quinn agreements (Pet. pp. 4a-5a, 45a-46a).

After its purchase of Weber & Quinn assets, Humble employed 13 of the 24 former Weber & Quinn employees, and, as planned, immediately integrated them into its existing unit of New York employees (Pet. pp. 4a-5a, 17a, 46a-47a, 53a-54a).

On July 8, 1965, the National Labor Relations Board (Board) ruled that Humble's New York bargaining unit of employees included, specifically, the former Weber & Quinn employees who had been employed by Humble. *Humble Oil & Refining Co.*, 153 N. L. R. B. No. 111 (July 8, 1965).

ARGUMENT

POINT I.

CONSIDERATION OF THIS CASE BY THIS COURT IS UNWARRANTED.

John Wiley & Sons, Inc. v. *Livingston,* 376 U. S. 543, was decided by this Court on March 30, 1964. Since that decision only two Courts of Appeals, other than the Second Circuit in this case, have considered the application of *Wiley* in the context of a purchase of assets by a successor company. *United Steelworkers* v. *Reliance Universal, Inc.,* 335 F. 2d 891 (3d Cir. 1964); *Wackenhut Corp.* v. *United Plant Guard Workers,* 332 F. 2d 954 (9th Cir. 1964). Both Courts of Appeals agreed that a company which purchases an entire existing bargaining unit of another company and continues the operation substantially as before is obligated to arbitrate under contracts between the predecessor company and the union representing a majority of employees in that existing bargaining unit. The Second Circuit cited those cases with approval (Pet. p. 1a).

Neither *Wiley* nor any decided federal court case prior to the instant one has involved the claimed duty of a successor employer to arbitrate under a predecessor's contract where the employees of the predecessor were integrated into a different unit of the successor's employees represented by a different union. "There is no problem of conflict with another union . . . since Wiley had no contract with any union covering the unit of employees which received the former Interscience employees." 376 U. S. at 552, n. 5.

The decision below in the present case does not conflict with either *Wiley* or the post-*Wiley* decisions in other circuits, and review by this Court is therefore unwarranted.

POINT II.

THE DECISION BELOW IS CLEARLY CORRECT AND DOES NOT REQUIRE REVIEW BY THIS COURT.

A. The National Labor Relations Act Precludes Humble From Arbitrating With Local 553.

It has long been clear that under the Act, an employer must bargain exclusively with the union representing its employees and with no other union. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937).

It is equally clear that the arbitration of grievances is an integral part of collective bargaining as that term is defined in Section 8(d) of the Act. 29 U. S. C. § 158(d); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 578 (1960).

As stated above, the Board has ruled specifically that Humble's New York bargaining unit includes the 13 former Weber & Quinn employees; and that unit is, and at all times material has been, represented by the Association for all purposes of collective bargaining. Because the Association is the representative of the former Weber & Quinn employees, it would be a violation of the Act for Humble to arbitrate (*i.e.*, bargain collectively) with Local 553 with respect to those employees.

The Court should not be misled by Petitioners' suggestion that *Wiley*, when read with *Garment Workers'* v. *NLRB*, 366 U. S. 731 (1961), justifies a departure from the accepted rule that an employer must bargain only with the exclusive bargaining agent of its employees. The *Garment Workers* decision held only that it is an unfair labor practice to recognize as exclusive bargaining agent for the entire unit a union which does not represent the majority of workers in that unit. *Garment Workers* did not dis-

turb the clear holding of this Court in *Consolidated Edison Co.* v. *NLRB,* 305 U. S. 197 (1938), that in the absence of an exclusive bargaining agent a minority of employees in a unit can be represented by any union of their choice, and that an employer can bargain with such union without committing an unfair labor practice. 305 U. S. at 236-37. Thus, while in *Wiley* the Interscience employees might not have constituted an appropriate bargaining unit, no other union was the exclusive bargaining agent for those employees and, therefore, it was not an unfair labor practice for Wiley to bargain with the minority union concerning matters pertaining only to the workers it represented.

Nor should the Court be misled by Petitioners' criticism of the Board of permitting clarification of a unit not previously certified (Pet., pp. 15-16), in a proceeding to which Petitioner was made a party. No claim has ever been made that Humble wrongfully recognized the Association as exclusive bargaining agent or that the Association did not at all relevant times represent a majority of the Humble employees in the unit. Absent such a claim (and proof to support it), there is no occasion to distinguish between a certified and uncertified unit.

B. Humble Has Never Been "Related To" the Weber & Quinn Agreements and, Therefore, Is Not Bound by Their Arbitration Provisions.

"[T]he duty to arbitrate . . . must be founded on a contract" between the parties or one "which is *reasonably related* to the party sought to be obligated." [Emphasis added.] 376 U. S. at 550.

In *Wiley,* one of the two merged companies was party to an agreement to arbitrate with the union; and because *Wiley* involved a statutory merger, neither company was legally able to disavow any of its former obligations, including the obligation to arbitrate. Thus, the party to the

arbitration agreement (which became part of Wiley) remained bound by that agreement, and this Court found that Wiley consequently was "reasonably related" to it.

In the instant case, Humble purchased only certain portions of Weber & Quinn's business—primarily intangibles. Weber & Quinn continued in existence as an entity; in fact, it received payments from Humble for a period of 18 months after the purchase. No division or unit of Weber & Quinn became a part of the Humble operation and, therefore, Humble has never had a relationship to the Weber & Quinn agreements. To the contrary, Humble expressly disavowed any obligation under those agreements, because of the conflict which would arise between those agreements and Humble's existing agreement with the Association covering its New York employees.

C. The Rights of the Former Weber & Quinn Employees Under the Weber & Quinn Agreements Are Fully Protected and, Therefore, There Is No Policy Consideration Requiring Humble to Arbitrate With Local 553.

Local 553 argues in its Petition that if Humble is not required to arbitrate under the Weber & Quinn agreements the rights of the former Weber & Quinn employees under those agreements will be lost. That argument is clearly incorrect and was rejected by the Second Circuit.

Weber & Quinn was obligated under the Act to bargain with Local 553 about its decision to sell part of its business to Humble and the effect of such decision on the Weber & Quinn employees. *Weingarten Food Center of Tenn., Inc.*, 140 N. L. R. B. 256 (1962). During that bargaining, the contractual rights of the employees could and should have been discussed. Any differences with respect to the extent or nature of those rights could and should have been arbitrated with Weber & Quinn. Presumably those differences still can be so arbitrated.

In any arbitration proceeding between Local 553 and Humble, an award against Humble could result only in an order (i) to apply the various provisions of the Weber & Quinn agreements to the former Weber & Quinn employees, or (ii) to make a cash payment to such employees for rights under such agreements which were lost as a result of the sale by Weber & Quinn.

The former order, if obeyed, would necessarily cause Humble to violate its contract with the Association which, as a matter of law under the Act, covers those employees, and would foster unrest and dissatisfaction among the vast majority of Humble's employees.

The latter order would impose on Humble an obligation which it expressly disavowed in the purchase agreement with Weber & Quinn and which presumably was taken into account in fixing the consideration for the purchase. Such a result is unreasonable in view of the fact that Weber & Quinn, the party to the agreements, continued in existence beyond the date of the purchase and had assets from the purchase sufficient to pay such an award.

CONCLUSION

The Petition seeks review of a decision which is in harmony with the Act, the law established by this Court and the decisions in other circuits. It should be denied.

Respectfully submitted,

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